Supreme Court, U.S.
FILED

No. 97-971508

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In The

Supreme Court of the United States

October Term, 1997

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

and

ROBERT C. HILLIARD and BARRY J. NACE,

vs. *Petitioners,*

MERRELL DOW PHARMACEUTICALS, INC.,

and

THE SUPREME COURT OF THE STATE OF TEXAS, consisting of CHIEF JUSTICE THOMAS PHILLIPS, and ASSOCIATE JUSTICES, GREG ABBOTT, JAMES BAKER, CRAIG ENOCH, RAUL GONZALEZ, DEBORAH HANKINSON, NATHAN HECHT, PRISCILLA OWENS, and ROSE SPECTOR,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Texas

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Volume II, Pages 177-343

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IN THE SUPREME COURT OF TEXAS

No. 95-1036

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PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

INDIVIDUAL RESPONSE OF REBECCA E. HAMILTON TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997
AND
MOTION TO RECUSE

COMES NOW Rebecca E. Hamilton, one of the counsel for respondents (sometimes collectively "Respondents' Counsel"), and serves and files this Individual Response of Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response").

Ms. Hamilton files this instrument subject to and in light of the response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton and Motion to Recuse. She refers the Court to the "Factual and Procedural Background" portion thereof, as well as to the exhibits

attached thereto and to the Affidavit of Rebecca E. Hamilton In Response To Show Cause Order Dated November 13, 1997 ("Hamilton aff."). Ms. Hamilton files this Response to highlight issues relating to her own particular position for the Court's case of consideration and she respectfully shows as follows:

II.

RESPONSE OF REBECCA E. HAMILTON

A. Ms. Hamilton Has Committed No Contemptuous Or Sanctionable Conduct.

Ms. Hamilton has committed no contemptuous conduct because:

(1) Of the ten pages identified by the Court as being of particular concern in the Motion for Rehearing, Ms. Hamilton contributed substantively to only three, namely, pages 8, 14, and 16, none of which contain any language that appears to be of concern.

(2) Ms. Hamilton wrote only the legal analysis portion of the Motion for Rehearing and not the argument portions;

(3) Ms. Hamilton did not sign the Motion for Rehearing;

(4) Ms. Hamilton was not lead counsel on the case and therefore did not have the authority necessary to make final decisions as to appropriate use of rhetoric as to the Motion for Rehearing; and

(5) Ms. Hamilton acted at all times in good faith and with the sole intent to provide her

clients with effective and zealous representation within the bounds of her legal and ethical duties.

1. Ms. Hamilton Did Not Sign the Motion for Rehearing.

Ms. Hamilton urges the Court not to sanction her under Rule 13, Texas Rules of Civil Procedure, or Texas Civil Practice & Remedies Code § 10.001, as she did not sign the Motion for Rehearing. Hamilton Aff. at ¶ 25. Both Rule 13 and § 10.001 authorize sanctions against the signatory *only*.

In *GTE Communications Systems Corp. v. Tanner*, the Court held, "Rule 13 applies only to pleadings, motions and other papers *signed* by attorneys." 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding) (Hecht, J.) (emphasis added). The same result obtains under Texas Civil Practice & Remedies Code §§ 10.001-006; section 10.001 provides in its preamble, "The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry. . . . " (emphasis added.) In short, the Court should not sanction Ms. Hamilton because she did not sign the pleading at issue. Hamilton Aff. at ¶ 25.

2. Ms. Hamilton Did Not act Contemptuously, Grievably, or Sanctionably.

Regardless of the significance of the signature requirement, Ms. Hamilton does not believe that any

sanctions against her are appropriate. Given Ms. Hamilton's good reputation and long and continuing history of pro bono and other worthy activities, sanctions are certainly not necessary to obtain Ms. Hamilton's compliance with her legal and ethical obligations. *See* Hamilton Aff. at ¶¶ 2-3, 6-8, 11, and 13. Further, Ms. Hamilton's work in other cases pending before this Court shows her fit character, as well. Hamilton Aff. at ¶ 10.[1]

In *TransAmerican Natural Gas Co. v. Powell*, this Court wrote, "In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed." [. . .] "Second, just sanctions must not be excessive." 811 S.W.2d 913, 917-18 (Tex. 1991) (Hecht, J.). The Court further observed, "The imposition of very severe sanctions is limited, not only by these standards, but by constitutional due process." *Id.* at 918 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958)). As Justice Gonzalez observed in his concurrence in *TransAmerican*, "[J]udges should not be trigger happy. They should first issue orders[.]" (Gonzalez, J., concurring). *Id.* at 920.

---

[1] Ms. Hamilton currently has four other matters pending before the Court:

Hyundai Motor Co. v. Alvarado, Cause No. 95-0969;

Clawson v. Wharton County, Cause No. 97-0190;

Chambers v. Wharton County; Cause No. 97-0190; and

Martinez v. Uniroyal Goodrich Tire Co., Cause No. 95-1159.

Ms. Hamilton encourages the Court to review her work in each of those other cases.

One Texas court has spelled out the application of *TransAmerican* more fully in the context of "bad faith" use of the judicial process. In *Kutch v. Del Mar College*, the Corpus Christi Court of Appeals observed:

> Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith use of the judicial process, such as any significant interference with the traditional core functions of Texas courts.
>
> Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise of one of these powers.

831 S.W.2d 506, 510 (Tex. App. – Corpus Christi 1992, no writ). With these principles in mind, Ms. Hamilton believes that the Court will determine that sanctions are not appropriate under the circumstances.

As Ms. Hamilton's affidavit proves, she only drafted the legal analysis sections of the Motion for Rehearing. Hamilton Aff. at ¶ 22. She advised Mr. Hilliard to remove certain portions of the Motion for Rehearing that she believed were of concern. *Id.* at ¶ 22. Mr. Hilliard chose not to do so, as was his right as lead counsel, signed the Motion for Rehearing, and filed it. *Id.* at ¶ 22. Ms. Hamilton is unable to identify any offensive language drafted by her or any act of contemptuous or sanctionable act committed by her *Id.* at ¶ 20.

B. If The Court Penalizes Ms. Hamilton on the Facts Here, It Impairs Her Constitutional Rights to Free Speech, as Well as Her Clients' Free Speech *and* Zealous Representation Rights.

Any decision by this Court to punish Ms. Hamilton and, therefore, Kelly calls into play the protections of the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as the free speech, open courts, and due course of law provisions of the Texas Constitution. *See* U.S. Const. amends. I, V, VI, and XIV, and Tex. Const. art. I, §§ 8, 13, and 19.

As to Kelly, Ms. Hamilton respectfully reminds the Court that, "Most importantly, the rights of litigants may be infringed by the abusive exercise of this power." *Kutch v. Del Mar College*, 831 S.W.2d 501, 510 (Tex. App. – Corpus Christi 1992, no writ). To the extent that Kelly has been punished for Ms. Hamilton's conduct. Ms. Hamilton passionately urges the Court to again rehear the legal issues and punish Ms. Hamilton only – *give Kelly her new trial under the new law the Court has created.* No language by Kelly's attorneys should alter this and, to the extent such may have occurred, her federal First and Sixth Amendment rights have been compromised, as well as her rights under article I of the Texas Constitution.

Kelly prevailed before the Corpus Christi Court of Appeals because of an emotional and vehement motion (which pre-dates Ms. Hamilton's involvement in this case) not unlike the one at issue here. That court rewarded her efforts to catch its attention with a complete reversal of position in her favor. If this Court should decide to punish Kelly and Ms. Hamilton as the Show

Cause Order portends, it will chill both their efforts to pursue her case further by appeal to the United States Supreme Court by, among other things, requiring Ms. Hamilton to focus her energies on her self-defense when she should be preparing further appellate papers.

Of additional importance are the First, Fifth, Sixth, and Fourteenth Amendment rights of Ms. Hamilton, and the attorneys and litigants throughout Texas with cases on appeal. *See also* Tex. Const. art. I, §§ 8, 13, and 19. Appellate attorneys' efforts will be chilled should the court sanction or otherwise find Ms. Hamilton in contempt here. This is the most serious implication of the Court's decision. Attorneys have and will have no guide for when representation is "too zealous" and rhetoric is "too much." For example, Ms. Hamilton has shown a copy of pages 8, 14, and 16 of the Second Motion for Rehearing to several local attorneys – all members of the defense bar. (These are the only pages to which Ms. Hamilton contributed that the Court notes as being of concern.) Not one could ascertain the language the Court perceives as contemptuous and sanctionable, nor can Ms. Hamilton. Hamilton Aff. at ¶ 20.

C. Ms. Hamilton Has Constitutional Rights to Adequate Notice, a Hearing, a Jury, and the Recusal of This Court.

Ms. Hamilton, like all Texans, is entitled to adequate notice and a hearing. "[D]ue process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense – a right to his day in court. . . . ' " *See Holt v.*

Virginia, 381 U.S. 131, 136 (1965) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)), and *Ex parte Carney*, 903 S.W.2d 345, 346 (Tex. 1995) (*per curiam*) ("Due process of law demands that before a Court can punish for a contempt not committed in its presence, the accused must have full and complete notification of the subject matter, and the show cause order or other means of notification must state when, how and by what means the defendant has been guilty of the alleged contempt.") (quoting *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969)); *see also Ex parte Alloju*, 907 S.W.2d 486, 487 (1995) (*per curiam*) (addressing whether a person may be held in contempt if the sanction imposed is coercive only and not punitive and holding that, regardless of whether coercive or punitive, the accused contemnor must have hearing before the Court). Here, the Court has denied Ms. Hamilton both of these fundamental elements of due process.

In *Ex parte Chambers*, this Court held that notice and hearing with evidence was necessary in a case of direct, criminal contempt. 898 S.W.2d 257, 259-60 (Tex. 1995). Clearly, then, in a case of indirect, constructive contempt, based on the "tenor" of an attorney's briefing, notice and an evidentiary hearing are necessary. The Court has declined to identify what specific language on what pages is of concern. Accordingly, Ms. Hamilton does not have adequate notice. The Court also has denied her a hearing. Ms. Hamilton respectfully contends that these two decisions are erroneous.

Ms. Hamilton is entitled to a jury to ascertain the truth or reckless disregard, if any, of the Second Motion for Rehearing. *See Holt v. Virginia*, 381 U.S. 131, 136 (1965) (noting that the contemnor was constitutionally deprived

by his lack of opportunity to prove the truth or falsity of his charges against the court of bias), and *Ex parte Sproull*, 815 S.W.2d 250 (Tex. 1991) (accused contemnor entitled to a trial by jury under Sixth Amendment if major offense); *see also Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984) ("The Sixth Amendment to the United States Constitution guarantees the right to jury trials for serious offenses, but not petty offenses.") (quoting *Muñiz v. Hoffman*, 422 U.S. 454, 475-76 (1975)), and *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983) ("[P]rocedural safeguards for contempt do not derive from the sixth amendment, but arise under traditional notions of due process.").

In *Ex parte Johnson*, this Court held that, "The right to be present at trial and confront witnesses is fundamental and essential to a fair trial." 654 S.W.2d 415, 421 (Tex. 1983) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). It further observed that, "The right is protected under Texas law by article 1, section 10 of the Texas Constitution." *Johnson*, 654 S.W.2d at 421. Ms. Hamilton asks only for the same rights afforded thousands of Texans each day, who face loss of liberty and property.

Ms. Hamilton respectfully urges that this Court recuse itself as to the grievance issues because, "The Grievance Committee is an administrative agency of the judicial department and is the arm of the Supreme Court in the discharge of its professional policing duties." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 434 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.), and *State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972). A referral by this Court of Ms. Hamilton to the Grievance Committee is a referral of her to itself. The Court thus should recuse itself and allow another judicial body to make such a decision.

Ms. Hamilton further urges that this Court should recuse itself as to the contempt, grievance, and/or sanctions issues because of the factual matters regarding which she is entitled to an evidentiary hearing and jury. The Show Cause Order threatens Ms. Hamilton's ability to practice law, to engage in free speech, and already has damaged her good reputation in the legal community. The Court has denied her a hearing. If the Honorable Court reconsiders and allows Ms. Hamilton the fundamental right to adduce evidence in support of the truth, or the lack of reckless disregard thereof, of the language in the Second Motion for Rehearing, another court should sit to hear the evidence. Further, Justice Gonzalez already has spoken about this pending matter to the media, making both factual and opinion statements relevant thereto. (*See* Exhibit 3 to Response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton to Show Cause Order dated November 13, 1997 and Motion to Recuse.)

Accordingly, pursuant to rules 16.1-3 of the Texas Rules of Appellate Procedure, Ms. Hamilton moves the Court to recuse itself *as a body*. She respectfully refers the Court to rule 18b(2)(a) and (b), Texas Rules of Civil Procedure. Alternatively, Ms. Hamilton moves that Justice Gonzalez recuse himself from any deliberation as to this matter, because of his comments to the media. She respectfully refers Justice Gonzalez to Rule 18b(2)(d), Texas Rules of Civil Procedure

WHEREFORE, PREMISES CONSIDERED, Rebecca E. Hamilton respectfully request that this Court decline to enter an order of contempt or sanctions, that it decline to refer this matter to the Grievance Committee of the State Bar of Texas, and that it take no action penalizing her for

her participation in representing Kelly Havner. Alternatively, Ms. Hamilton asks for adequate notice of her alleged wrong-doing, an evidentiary hearing at which a jury may decide all factual issues, and that the court refer the issue of whether it recuse itself to another judicial official, unless it decides at this time to recuse itself as a body.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Response on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States Mail on this the 4th day of December, 1997.

/s/ Todd W. White
Todd W. White

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VERIFICATION

STATE OF TEXAS)
)
COUNTY OF ROCKWALL)

On this the 4th day of December, 1997, Rebecca E. Hamilton appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath, she said she had read this the Individual Response of Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response"), and that the facts pertaining to the Motion to Recuse

portion of the Response are within her personal knowledge and are true and correct.

/s/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO and SUBSCRIBED before me, the undersigned Notary Public, on the 4th day of December, 1997, to certify which witness my hand and seal.

[SEAL] NANCY SEMPLE
MY COMMISSION EXPIRES
June 30, 2001

/s/ Nancy Semple
Notary Public in and for the
State of Texas

APPENDIX M

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONSE OF ROBERT C. HILLIARD, BARRY J. NACE, AND REBECCA E. HAMILTON TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997 AND MOTION TO RECUSE

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
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ERNEST HAVNER and MARILYN HAVNER
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On Motion for Rehearing

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ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONSE OF ROBERT C. HILLIARD, BARRY J. NACE, AND REBECCA E. HAMILTON TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997 AND MOTION TO RECUSE

COME NOW Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter (sometimes collectively "Respondents' Counsel"), and serve and file this Response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response"), and, in support thereof, respectfully show unto the Court the following:

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. Five Years Ago, Kelly Won Her Case Under Then-Prevailing Law.

In 1991, a Nueces County jury began hearing the claims of Respondent, Kelly Havner ("Kelly"). The jury ruled in Kelly's favor in 1992; and, on June 1, 1992, the trial court entered judgment on the jury's verdict. Two years later, on March 17, 1994, the Corpus Christi Court of Appeals reversed the jury's verdict in its entirety. Texas law held no precedent for its decision.

B. Three Years Ago, the Corpus Christi Court of Appeals Stunned the Texas Court System, as Well as Kelly's Attorneys, When It Took Away Her Verdict.

The Corpus Christi Court's decision stunned the Texas legal community, as well as Kelly's attorneys. The Houston Court of Appeals for the 14th District, wrote passionately as to the injustice of the decision. *See Maritime Overseas Corp. v. Ellis*, 886 S.W.2d 780, 785-86 (Tex. App. – Houston [14th Dist.] 1994, writ granted). The 14th Court observed:

> *Havner's* conclusion totally ignores the expert's training, experience, knowledge, even treatment, test-tube analysis and chemical composition analysis. Needless to say, we disagree with that conclusion by a panel of our sister court. Our view of long standing Texas precedents reveals that Experts qualified on the basis of their experience, training, treatment, and knowledge, who testify in terms of reasonable medical probability not only constitute some evidence of

> causation, but are frequently determinative of the issue. . . . If *Havner* becomes binding precedent it its present form, we presume that our instructions to the jury based on Tex. R. Civ. P. 226a will have to be eliminated or certainly modified. No longer could we with judicial integrity instruct jurors that they "are the sole judges of the credibility of the witnesses and the weight to be given to their testimony."

Id. (citation omitted.)

Writings of Justice Hecht evidence further the furor evoked by the Corpus Christi Court's decision – and the flux of the law over issues relating to factual and legal sufficiency in cases of "novel scientific evidence." *See Maritime Overseas Corp. v. Ellis*, 40 Tex. Sup. Ct. J. 110 (Nov. 15, 1996) (Hecht, J., dissenting on denial of application for writ of error). Concerned over the legal issues revolving around the "novel scientific evidence" adduced in *Ellis*, and the Court's initial failure to grant Maritime's application for writ of error, Justice Hecht wrote:

> Today the Court granted applications for writ of error in three cases, and the motions for leave to file petitions for writ of mandamus in two cases. [. . .] Why were these cases granted and the present case denied? I cannot answer, partly because I do not know, and partly because I cannot say. [. . .] I do not intend in any way to impugn the motives of other Justices.

Id. at 113.

Upset, in particular, with a perceived lack of accountability on the part of individual Justices when voting on whether to grant an application for writ of error (because

the Count conducts the vote in secret), Justice Hecht wrote further:

> I have become convinced, however, that if each of the eight Justices participating in the decision had been constrained to explain his or her position publicly, the vote would have been different, and the application would have been granted. [. . .] "It is as well to remember that neither secrecy of the court's deliberation or later secrecy about what went on during that deliberation rests in the nature of things or in any ordinance of God. [. . .] I personally suspect that our own secrecy practice began when decision began to be postponed beyond the close of argument, with an eye to avoiding misapprehension and disappointment, and then to avoid any financial speculation. *And I suspect the carryover into later secrecy about past deliberations to represent partly a closing of ranks to protect the court from criticism or attack, and in later years a similar closing to allow free discussion with no possible repercussions in a re-election campaign."*

Id. at 113-14 (emphasis added) (quoting Arthur S. Miller & D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 Buffalo L. Rev. 799, 809-10 (1973)).

C. Kelly, Nevertheless, Won her Case on Rehearing After Her Attorneys Filed Controversial and Vehement Papers.

Robert C. Hilliard, as stunned as by the Corpus Christi Court's initial decision as was the 14th court, filed the first rehearing papers in this cause, on April 1, 1994.

After Petitioner, Merrell Dow Pharmaceuticals, Inc. ("Merrell"), opposed Respondents' efforts, Mr. Hilliard filed "Appellees' Response to Merrell's Opposition to Appellees' Motion for Rehearing and En Banc Consideration ("First Motion for Rehearing"). (Respondents' Counsel attach hereto a copy of the First Motion for Rehearing as "Exhibit 1.") Notwithstanding – indeed, perhaps because of – the passionate rhetoric reflected in his First Motion for Rehearing, on August 10, 1995, the Corpus Christi Court of Appeals conceded the error of its initial decision and, on rehearing *en banc*, issued a new opinion affirming the jury's verdict.

Although the Corpus Christi Court of Appeals did refer Mr. Hilliard to the grievance committee, because of the language he employed in the First Motion for Rehearing, *it did not sanction Mr. Hilliard or otherwise attempt to find him in contempt* – perhaps because Kelly won subsequent to his filing of the First Motion for Rehearing.

D. Two Years Ago, Merrell Sought Review by This Court.

On November 17, 1995, Merrell filed its Application for Writ of Error ("Application") to this Court and the normal briefing practice began.[1] On March 19, 1996, the

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[1] Respondents' Counsel recently called the Court to verify the Application's filing date. A clerk informed Respondents' Counsel that Merrell filed its Application on December 11, 1995. The certificate of service on the copy of the Application that Merrell forwarded to Kelly, however, reflects a November 17, 1995 filing date. Respondents' Counsel therefore are unsure of the correct date. They refer in the text to Merrell's date as

parties argued the case to the Court, previously having submitted extensive briefing.

At the same time as these events unfolded, lead counsel for Merrell, Mr. John L. Hill, Jr., was engineering a statewide campaign to raise over $500,000.00 for sitting Justice Baker. Mr. Hill did not notify or in any way apprise Messrs. Hilliard and Nace, nor Ms. Hamilton, of his efforts in this regard. Nor did he apprise the other members of this Court – as was his duty under the Texas Disciplinary Rules of Professional Conduct. *See* Tex. Disciplinary R. Prof. Conduct 3.05(b) (1995), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. (Vernon 1988 & Pamph. 1998) (State Bar Rules art. X, § 9). Nor did Justice Baker. *See* Texas Code Jud. Conduct, Canons 2(B), 3(B)(1) and (D)(2), 4(A)(1), and 5, *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. G app. (Vernon Pamph. 1998). Despite this, no member of this Court issued a show cause order requiring Mr. Hill or Justice Baker to explain these failures.

E. After Kelly's Attorneys Learned Merrell's Lead Attorney, Mr. Hill, Was Engineering a $500,000.00 Fundraising Campaign in Support of Justice Baker's Re-Election, Kelly Prevailed on a Recusal Motion.

Mr. Hilliard received a copy of Mr. Hill's fundraising letter on behalf of Justice Baker shortly after oral argument. Immediately thereafter, on April 11, 1996, Kelly

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reflected on the Application's certificate of service because Rule 13 recognizes the presumption of good faith that attaches to all filed pleadings. Tex. R. Civ. P. 13 ("Courts shall presume that pleadings, motions, and other papers are filed in good faith.").

moved to recuse Justice Baker. Respondents' Counsel attach a copy of the Motion to Recuse (with the fundraising letter as an exhibit thereto) as "Exhibit 2." Justice Baker immediately and properly – but belatedly – recused himself.

F. Five Months Ago, Kelly Lost, Again, on Initial Appeal and Her Attorneys, Again, Filed Controversial and Vehement Rehearing Papers.

The case languished on appeal for over a year. Then, on July 9, 1997, the Court issued its opinion, reversing the jury's verdict and the Corpus Christi Court of Appeals' decision, concluding that Kelly did not deserve so much as a new trial, despite the fact that the Court appeared to create new law on what constitutes legally sufficient evidence in cases involving expert testimony. This was the second time Kelly's case had generated new law.

On July 24, 1997, Respondents' Counsel filed the motion for rehearing at issue (the "Second Motion for Rehearing"). The matter languished nearly another half year, until, on November 13, 1997, this Court summarily denied Kelly's request for a rehearing and remand for a new trial. The Court further ordered that her counsel show cause why they should not be found in contempt and monetarily sanctioned, referred to the grievance committee, and – in the case of Mr. Nace – barred from practice in the State of Texas (the "Show Cause Order"), because of the "tenor" of the Second Motion for Rehearing.

Since November 13, 1997, all three of Kelly's counsel – whom she fully supports in these endeavors – respectfully have asked this Court to grant them a hearing on the Show Cause Order and to clarify the Show Cause Order. The Court has denied their requests without comment. Respondents' Counsel also have moved for a jury trial. To date, Respondents' Counsel has received no ruling on this motion.

II.
RESPONSE

A. Respondents' Counsel Have Committed No Contemptuous Conduct.

1. The Court Accuses Respondents' Counsel of Committing Criminal Contempt.

The Court is offended by the "tenor" of Respondents' Counsels' motion for rehearing, which it apparently considers contemptuous. (Show Cause Order at 1.) *See Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) ("Contempt of court is broadly defined as disobedience to or disrespect of a court by acting in opposition to its authority." (and cases cited therein)). The Court has accused Respondents' Counsel of "criminal contempt," as opposed to "civil contempt" – civil contempt requiring the violation of a pre-existing order. *Ex parte Werblud*, 536 S.W.2d 542, 545-46 (Tex. 1976) (defining and distinguishing the concepts of "civil" and "criminal" contempt). Accordingly, the Court seeks to issue a punitive decree of contempt by levying monetary sanctions. (Show Cause Order at 4.) *See* Tex. R. Civ. P. 13 ("Attorneys . . . who make statements in pleading which they know to be

groundless and false . . . shall be held guilty of contempt."), and *Ex parte Griffin*, 682 S.W.2d 261, 263 (Tex. 1984) (Robertson, J., concurring) ("Contempt is a 'unique' sanction.").

Although it is not clear whether the contempt that the Court alleges is present in the Second Motion for Rehearing is "constructive" or "direct," nor whether it is "petty" or "serious" (because the Show Cause Order lacks specificity)[2], in any of these circumstances the law entitles Respondents' Counsel to specific notice and an evidentiary hearing. *See, e.g., Ex parte Chambers*, 898 S.W.2d at 262 ("Full and unambiguous notice of the accusation of contempt must be served on the alleged contemnor"), and *Ex parte Bell*, 894 S.W.2d 118, 129 (Tex. 1995) ("Punishment without issue or trial is so contrary to the usual and ordinary indispensable hearing before judgment, constituting due process[.]"). *See generally* William W. Kilgarlin & Scott A. Ozmun, *Contempt of Court in Texas – What You Shouldn't Say to the Judge*, 38 Baylor L. Rev. 291, 302-303 (1986).

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[2] *Cf. Ex Parte Werblud*, 536 S.W.2d at 545-46 (defining and distinguishing the concepts of "constructive" versus "direct" and "petty" versus "serious" contempt). For example, the Show Cause order fails to state the amount in monetary penalties that the Court seeks; thus, Respondents' Counsel are unable to ascertain whether the contempt at issue is "petty"or "serious." As to the constructive or direct contempt issue, the law appears unsettled on whether words filed in a brief on rehearing even can form the basis for a direct contempt in open court. *See Craig v. Harney*, 331 U.S. 367, 377 (1947) ("If the point had been made in a petition for rehearing and reduced to lawyer's language, it would be of trifling consequence.").

Respondents' Counsel respectfully submit that they find themselves at a peculiar disadvantage in responding to the Court's Show Cause Order because: (1) the Court has denied them specific notice of the charges and precise amounts of the sanctions at issue; and (2) the Court has denied them any hearing, much less an evidentiary hearing Respondents' Counsel believe that due process, and notions of basic fairness, entitle them to notice and a hearing. The Court, however, appears not to agree. Therefore, and without waiving these complaints, Respondents' Counsel endeavor to respond to the Show Cause Order as best they can.

2. The Passionate and Vehement Language At Issue Does Not Disrupt the Administration of Justice.

The Court premises its accusations of criminal contempt on the "tenor" of the Second Motion for Rehearing, identifying 10 out of 20 pages as being of "particular concern." (Show Cause Order at 1 and 3.) Because the Court has declined to clarify its Show Cause Order and specify the precise language on these pages that it finds contemptuous, Respondents' Counsel have categorized the language they believe to be at issue into the following broad categories: (1) language suggesting "bias" or "result orientation"; (2) language suggesting failure to follow existing case law; (3) language suggesting failure to resolve the matter on appeal expeditiously[3]; and (4) negative metaphor.

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[3] Respondents' Counsel respectfully note that Texas courts frequently so comment without sanction by this Court. *See, e.g.,*

The Show Cause Order does not suggest that Respondents' Counsels' conduct was "boisterous" or "disruptive." Nor could the Court so contend, given that the allegedly objectionable language at issue appeared in a written document filed with the court and not in a face-to-face confrontation in open court. Indeed, Justice Gonzalez' recent and out-of-the-ordinary statements on the pending issues now before the Court to the media prove Respondents' Counsel's conduct was not boisterous or disruptive – according to Justice Gonzalez, the Court was on vacation at the time of its filing. (Respondents' Counsel attach hereto a copy of the article from *Texas Lawyer* that contains Justice Gonzalez' statements as "Exhibit 3.") Respondents' Counsel believe that the fact that nearly half a year elapsed between the filing of Second Motion for Rehearing and the Court's Show Cause Order shows that no appellate disruption occurred.

Under these circumstances, no contemptuous conduct can be said to have occurred. After all, "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947).

Eagle Properties, Ltd. v. Scharbauer, 816 S.W.2d 559, 563 (Tex. App. – El Paso 1991, writ denied) (Osborne, C.J. concurring) ("This is another case which has been placed in 'appellate orbit.' "). Further, Texas law appears to render the subject appropriate for comment. *See* Tex. Gov't Code § 21.001(b) ("A court shall require that proceedings be conducted with dignity and in an orderly and *expeditious* manner and control the proceedings so that justice is done." (emphasis added)).

When mere words on paper are all that is at issue, "The vehemence of the language used is not alone the measure of the power to punish for contempt[;]" rather, it is, "[T]he fires which it kindles must constitute an imminent, nor merely a likely, threat to the administration of justice." *Id.*

In other words, Respondents' Counsels' conduct, which evidently went unnoticed at first, actually must have disrupted the Court or otherwise constituted an imminent threat to the administration of justice for this Court to hold them in contempt. *In re Little*, 404 U.S. 553, 555 (1972) (quoting *Craig v. Harney*, 331 U.S. at 376). A showing of "obstruction" or "imminence" is an essential element of contempt, and not a mere factor to be considered. *In re McConnell*, 370 U.S. 230, 234 (1962) ("An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted.") (quoting *ex parte Hudgings*, 249 U.S. 378, 383 (1918)); *see also Holt v. Virginia*, 381 U.S. 131, 136 (1965) (addressing "vile, contemptuous, insulting language" used in allegations of bias and need to recuse, and observing, "Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part.").

Texas law, of course, agrees. *See, e.g., Ex parte Bell*, 894 S.W.2d 119, 127 (Tex. 1995) ("The essence of 'contempt' requires conduct that obstructs or tends to obstruct the proper administration of justice.") (quoting *Brown v.*

United States, 356 U.S. 148 (1958)), and *Ex parte Gibson,* 811 S.W.2d 594, 596 (Tex. Crim. App. 1991) (*per curiam*) ("The 'essence' of contempt requires conduct that obstructs or tends to obstruct the proper administration of justice.").

Given that the language that Respondents' Counsel assume is at issue consists of suggestions of bias and result orientation, a lack of expedience in issuing opinions, and negative metaphor – all being examples of language that this Court has employed in describing itself (*see* § B.2., below) – Respondents' Counsel do not believe that the record reflects contempt. The Court may not like the "tenor" of the Second Motion for Rehearing, but this is not enough to support a finding of contempt for, "a judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him.' " *Craig v. Harney,* 331 U.S. 367, 373 (1947) (quoting *Craig v. Hecht,* 263 U.S. 255, 280 (1923) (Holmes, J., dissenting, joined by Brandeis, J.).

a. Respondents' Counsel Did Not Disrupt the Administration of Justice.

None of the language that Respondents' Counsel believe to be at issue constitutes an "obstruction of the administration of justice." The absence of disruptive conduct by Respondents' Counsel renders this so. In *In re Little,* the U.S. Supreme Court held that statements by petitioner to the trial court "that the court was biased and prejudged the case" did not constitute boisterous or otherwise disruptive conduct and, thus, could not be the basis for a finding of contempt, even though the accused

uttered them in open court. 404 U.S. 553, 554-55 (1972); *see also In re McConnell*, 370 U.S. 230, 234 (1962) (disruption must be "clearly" evidenced by record).

In *Ex parte Curtis*, the Texas Court of Criminal appeals likewise held that the record was devoid of evidence of disruption of judicial administration in any way, notwithstanding the accused contemnor's statements in open court that:

> Merely because I feel that you are acting in favor of this defendant in derogation of the State's case illegally and improperly . . . I think you're acting like a biased judge trying to help this defendant beat a darn good case.

568 S.W.2d 363, 366 (Tex. Crim. App. 1978). This very Court recently has held, "Offensive comments, even those spoken in open court, are not contumacious unless they are disruptive or boisterous." *Ex parte Bell*, 894 S.W.2d 119, 127 (Tex. 1995) (and cases cited therein). Respondents' Counsel do not believe that the record shows their comments to have been "disruptive" and do not believe that words on a page can be held to be "boisterous."

In a judicial system premised on the election of officials, the reasoning behind these rulings is compelling: "Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected. Discussion of their conduct is appropriate, if not necessary." *Craig v. Harney*, 331 U.S. 367, 377 (1947). Respondents' Counsels' rhetoric does not exceed the level of that in *Craig* or *Ex parte Curtis*. Further, Respondents' Counsels' rhetoric occurred in filed pleadings – not open court.

Thus, Respondents' Counsel have committed no contemptuous conduct.

b. Respondents' Counsels' Conduct Does Not Pose Any Imminent Threat of Disruption of the Administration of Justice.

The language believed to be at issue appeared in pages of a brief that Respondents' Counsel filed with the Court five months ago; it did not occur in open court. Respondents' Counsel are aware of no change in the Court's administration of justice over the past five months, nor has this Court suggested any. These facts preclude a finding of contempt because such language did and cannot cause "immediate" or "imminent" harm. As the United States Supreme Court expressly had declared:

> The danger must not be remote or even probable; it must immediately imperil[.] The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. . . . [C]ourts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.

In re Little, 404 U.S. 554, 555 (1972) (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958)). Likewise, this court recently has held, "To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court[.]" *Ex parte Bell*, 894 S.W.2d 119, 129 (Tex. 1995) (quoting *Cooke v. United States*, 267 U.S. 517, 534 (1925)). Respondents' Counsel believe that when, as here,

the language at issue is in filed papers – and not presented in open court – and has been on file for nearly half a year, no imminent threat exists.

3. The Entry of a Decree of Summary Contempt Is Inappropriate on the Facts.

By denying Respondents' Counsel adequate notice and a hearing, this Court engages in summary contempt. In so doing, Respondents' Counsel respectfully contend that the Court exceeds its power – regardless of the authority upon which it seeks to premise its decision. *See* Tex. R. Civ. P. 13 and Tex. Civ. Prac. & Rem. Code §§ 9.003, 10.003, and 10.006 (Vernon Supp. 1998). Sanctions issued pursuant to the Court's inherent contempt authority are likewise subject to these basic, due process requirements. The United States Supreme Court wrote in June of this year:

> We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

Pounders v. Watson, 1997 U.S. LEXIS 4045, at *7 (June 27, 1997) (quoting *In re Oliver*, 333 U.S. 257, 275 (1948)). And, only two years ago in *Ex parte Chambers*, this Court held that notice and an evidentiary hearing are necessary in a

case of direct, criminal contempt. 898 S.W.2d 257, 259-60 (Tex. 1995). This Court held, "Full and unambiguous notice of the accusation of contempt must be served on the alleged contemnor." *Id.* at 262 (quoting *Ex parte Adell*, 769 S.W.2d 521 (Tex. 1989)). Clearly, then, in a case of indirect, constructive contempt (such as this one), based on the "tenor" of an attorney's briefing, notice and an evidentiary hearing are necessary.[4]

B. Respondents' Counsel Have Engaged in No Sanctionable Conduct.[5]

As a preliminary matter, Respondents' Counsel do not believe the Court may sanction either Mr. Nace or Ms. Hamilton under rule 13 or Tex. Civ. Prac. & Rem. Code § 10.001. Neither signed the Second Motion for Rehearing. Both rule 13 and § 10.001 authorize sanctions against the signatory *only*. Mr. Nace and Ms. Hamilton respectfully direct the Court's attention to the affidavits on file in connection with the Court's Show Cause Order to

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[4] Respondents' Counsels' right to and need for notice and an evidentiary hearing applies regardless of whether the contempt at issue is direct or indirect. In *Ex parte Bell*, this Court wrote, "When the contempt is not in open court [*i.e.*, "constructive" or "indirect"], however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witness and argument." 894 S.W.2d 119, 129 (Tex. 1995) (citing *Cooke v. United States*, 267 U.S. 517, 536 (1925)).

[5] The Court does not identify the authority on which it premises its power to sanction Respondents' Counsel. As to the Court's inherent, contempt authority, Respondents' Counsel refers the Court to § A, above.

evidence their assertions to this effect. In *GTE Communications Systems Corp. v. Tanner,* the Court held, "Rule 13 applies only to pleadings, motions and other papers *signed* by attorneys." 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding) (Hecht, J.) (emphasis added). The same result obtains under Tex. Civ. Prac. & Rem. Code §§ 10.001-.006; section 10.001 provides in its preamble, "*The signing of a pleading or motion* as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry. . . . " (Emphasis added.) In short, the court should not sanction either Mr. Nace or Ms. Hamilton.

Regardless of the significance of the signature requirement, Respondents' Counsel do not believe that any sanctions are appropriate or necessary. Respondents' Counsel respectfully direct the Court to its opinion in *TransAmerican Natural Gas Co. v. Powell,* in which the Court wrote, "In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed." [. . .] "Second, just sanctions must not be excessive." 811 S.W.2d 913, 917-18 (Tex. 1991) (Hecht, J.). The Court further observed, "The imposition of very severe sanctions is limited, not only by these standards, but by constitutional due process." *Id.* at 918 (quoting *Societe Internationale v. Rogers,* 357 U.S. 197, 209-10 (1958)). As Justice Gonzalez observed in his concurrence in *TransAmerican,* "[J]udges should not be trigger happy. They should first issue orders[.]" (Gonzalez, J., concurring). *Id.* at 920.

One Texas court has spelled out the application of *TransAmerican* more fully when "bad faith" use of the judicial process is at issue. In *Kutch v. Del Mar College,* The Corpus Christi Court of Appeals observed:

> Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith use of the judicial process, such as any significant interference with the traditional core functions of Texas courts. Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise of one of these powers.

831 S.W.2d 506, 510 (Tex. App. – Corpus Christi 1992, no writ). With these principles in mind, Respondents' Counsel believe that the Court will determine that sanctions are not appropriate under the circumstances.

1. Sanctions Are a Species of "Contempt" and, Accordingly, Are Subject to the Laws That Protect Those Accused of Contempt.

Respondents' Counsel again respectfully remind the Court that, "Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith use of the judicial process, such as any significant interference with the traditional core functions of Texas courts. Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise of one of these powers." *Kutch v. Del Mar College,* 831 S.W.2d 506, 510 (Tex. App. –

Corpus Christi 1992, no writ). In other words, due process limits a court's power to sanction. *See id.* (and cases cited therein). "The traditional Due Process protections of notice and hearing are also necessary before imposition of sanctions." *Id.* at 511 (citing *Sears, Roebuck & Co. v. Hollingsworth,* 293 S.W.2d 639, 642 (Tex. 1956)).

2. Respondents' Counsel Used the Court's Own Language; They, Therefore, Cannot Be Said to Have Used Sanctionable Language.

Respondents' Counsel find it difficult to understand how the Court could sanction them for using the same type of language the Court uses to describe itself. Indeed, Respondents' Counsel could have supported the language they assume is at issue with cites from the Court's own writings. As examples, Respondents' Counsel refer the Court to the writings of Chief Justice Phillips and Justices Abbott, Baker, Cook, Cornyn, Doggett, Enoch, Gammage, Gonzalez, Hecht, Hightower, Owen, Spears and Spector, fourteen officers of the Court whom this Court never has referred to the grievance committee or otherwise sanctioned, to the best of Respondents' Counsels' knowledge:

a. Members of This Court Frequently Refer to Its Bias and Result Orientation.

(1) Under the guise of "no evidence" review, the majority has today once again rejected that "sound determination of the jury.[6]

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[6] *C&H Nationwide, Inc. v. Thompson,* 903 S.W.2d 315, 332 (Tex. 1994) (Doggett, J., dissenting).

(2) There are several ways in which the legislature could have written its enactment to satisfy Justice Hecht. [. . .] Only recently Justice Hecht attempted to apply this same approach to a civil service statute that met with his personal disapproval.[7]

(3) As if this were not enough injustice for one opinion, the majority concludes that those Texans who have unpleasant "working conditons" deserve less protection from our product safety laws than the rest of us.[8]

(4) Undoubtedly the insurance industry provides an important service to our society, but I see no reason why it should not have to comply with the law like the rest of us. But the majority's mission in recent months has been to dismantle, as much as possible, the different safeguards that insurance policyholders and beneficiaries have been previously assured by the laws of Texas.[9]

(5) Instead of fairness to all, the majority has replaced protection of insureds with protection of insurers, leaving the insurance industry largely free to do as it pleases.[10]

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[7] *Id.* at 334, 338 n.11.

[8] *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 756 (Tex. 1993) (Doggett, J., dissenting, joined by Gammage and spector, JJ.).

[9] *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 33 (Tex. 1994) (Doggett, J., concurring, joined by Gammage, J.).

[10] *Id.*

(6) The majority is committed to fulfilling its social agenda at any cost – mere precedent, a procedural rule, a statute or the Texas Constitution present no obstacles on the way to achieving whatever it perceives to be of ultimate benefit.[11]

(7) This decision merely represents a predetermined result in search of a rationale.[12]

(8) Empowered by this new, self-bestowed authority, the majority proceeds to reexamine the evidence from the perspective of an insurance company rather than, as required by the Texas Constitution, in the light most favorable to the verdict.[13]

(9) The majority summarily declares all of this as "no evidence" without even bothering to discuss it.[14]

(10) Given the determination of the majority to assume for itself the duties and powers of a jury, anyone – a judge, an attorney, a litigant, or a legal scholar – will be hard-pressed, in any given case, to understand the operative standard of appellate review – whether fundamental rules articulated in existing precedent govern, or whether what's really at work is some special unwritten standard of review, grounded in

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[11] *Id.* at 34.

[12] *National Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373, 377 (Tex. 1994) (Doggett, J., dissenting, joined by Gammage, J.).

[13] *Id.*

[14] *Id.* at 378.

an overriding fear that insurers could actually be compelled to pay claims.[15]

(11) This same type of "elitist view that our safety laws should afford less security to the poorly educated," which permeates *Dresser*, has today been extended to eliminate another important legal guarantee previously available to Texas consumers.[16]

(12) Instead of competent legal analysis, the majority substitutes itself for the jury in qualitatively evaluating the evidence and declaring that placement of a door-jamb label afforded a quite ample warning. With this type of approach the previously applicable Pattern Jury Charge can be tossed in the scrap heap. The majority has engaged in a series of word games to achieve its desired result; in no way has it accorded the parties an impartial review of the properly presented points of error. According to the jury, two Texans are dead as a consequence of a manufacturer's failure to warn; according to the majority, a little more Texas consumer product safety law is now dead, too, as our right to trial by jury ebbs away.[17]

(13) The majority engages in pure legal fiction to rewrite section 101.021 of the Tort Claims Act to reach the result it desires.

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[15] *Id.* at 379.

[16] *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 362 (Tex. 1993) (Gammage, J., dissenting, joined by Doggett, J.) (citations omitted).

[17] *Id.* at 366-67.

En route, the majority fails to recognize or distorts the application of our decisions in [citations omitted].[18]

(14) Today, however, the majority strips Doris Dodd of her constitutionally-protected rights and allows Texas school districts to arbitrarily refuse to renew school nurses' contracts without any notice or hearings at all.[19]

(15) The concurring opinion by Justice Gonzalez disingenuously asserts that this dissent, rather than the majority, would have the Court, "re-write statutes under the guise of interpreting them."[20]

(16) To the majority, this undisputed failure to make safe the premises and thereby prevent serious harm to an older Texan is just not important enough to merit the use of a deterrent afforded by a long established legal remedy.[21]

(17) By disregarding very real evidence presented in this particular case, the majority has replaced the jury's right to enforce a community standard with its own standard of permissiveness. Consistent with

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[18] *University of Tex. Med. Branch v. York*, 871 S.W.2d 175, 179-80 (Tex. 1994) (Gammage, J., dissenting, joined by Doggett and Spector, JJ.).

[19] *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994) (Spector, J., dissenting, joined by Hightower, Doggett, and Gammage, JJ.).

[20] *Id.* at 8 n. 1.

[21] *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 332 (Tex. 1993) (Doggett, J., dissenting, joined by Gammage and Spector, JJ.).

its increasing disfavor of decision-making by ordinary citizens composed as a jury, the majority essentially reconstitutes itself as a super-jury in Austin.[22]

(18) But with the jury's voice for the community unjustly squelched, the covenants of the public contract for the public good will no longer be enforced by the public.[23]

(19) When an unequivocal constitutional command and concern for the insurance industry collide in this Court, the outcome is no longer in doubt.[24]

(20) When disagreeing with a jury verdict – particularly a jury verdict adverse to an insurance company – the majority increasingly substitutes its own preferences in place of the deliberations of a constitutionally impaneled jury composed of twelve members of the local community. Today's opinion continues this steady erosion of our right to trial by jury.[25]

(21) In truth, it is our Texas Constitution that the majority, through its covert factual sufficiency review, has pronounced irrelevant.[26]

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[22] *Id.* at 336.

[23] *Id.*

[24] *Lyons v. The Millers Cas. Ins. Co.*, 866 S.W.2d 597, 602 (Tex. 1993) (Doggett, J., dissenting, joined by Hightower and Gammage, JJ.).

[25] *Id.* at 605.

[26] *Id.* at 605-606.

(22) Had the judgment been for the claimant because of the insurer's discovery abuse, not only would an oral hearing have been required, but the trial court's detailing of specific factual findings justifying the judgment would have been well advised, and de novo review by this Court of every detail of the trial court's order would have been assured.[27]

(23) I fear that the Court is signaling that at least in the area of discovery, mandamus will issue whenever this Court disagrees with a lower court's decision.[28]

(24) Stymied by the Constitution, the Court cannot decree the result it rather plainly wants to see in this case. To accomplish the desired end, the Court must keep reversing the judgment of the Court of Appeals until it reaches a result that the Court approves. Always the ground for reversal is that the appeals court either cannot or will not follow the law. For this Court to hold that an appeals court has not conducted its factual insufficiency analysis in a lawful manner, simply to coerce that court into changing its conclusion, is to usurp the constitutional

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[27] *Adamo v. State Farm Lloyds Co.*, 864 S.W.2d 491 (Tex. 1993) (Doggett, J., dissenting on denial of application for writ of error) (citations omitted).

[28] *Loftin v. Martin*, 776 S.W.2d 145, 152 (Tex. 1989) (Hecht, J., dissenting, joined by Phillips. C.J., Gonzalez, and Cook, JJ.).

prerogative of the court of appeals. That is what I believe is happening in this case.[29]

(25) The Court's stated basis for its reversal is diaphanous, and its real reason apparent: the Court simply does to agree with the appeals court's result. The Court may not agree with the constitutional delegation of the exclusive power to review the factual sufficiency of evidence to the court of appeals; indeed, I suspect rather strongly that it does not. But surely the Court is constrained to follow the constitution, and it should not attempt to circumvent this disfavored provision by accusing the appeals court of failing to perform its legal duty.[30]

(26) In essence, the Court holds that juries in FELA cases must not be told what the law is lest they become confused and find for the wrong party. I do believe the Court has achieved a new level in result-oriented decision making.[31]

(27) Surely this is a most remarkable result. The jury must decide what the railroad knew or should have known, the Court states, but the jury must not be told that they must decide the issue or they will become confused. To be absolutely sure

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[29] *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384 (Tex. 1989) (Hecht, J., dissenting, joined by Phillips. C.J., and Cook, J.).

[30] *Id.* at 388.

[31] *Mitchell v. Missouri-Kansas-Texas R.R. Co.*, 786 S.W.2d 659 (Tex. 1990) (Hecht, J., dissenting, joined by Gonzalez, Cook, and Hightower, JJ.).

that the jury will not become confused, just do not breathe a word to them about what the law is. It is acceptable to say in Supreme Court opinions that a railroad is not an insurer of the workplace, but don't tell the jury. If they heard such an instruction, they might actually believe it and find for the railroad. One cannot be too sure.[32]

(28) In their zeal to implement their own preferred social policy that Texas corporations not be held responsible at home for harm caused abroad, these dissenters refuse to be restrained by either express statutory language or the compelling precedent, previously approved by this very court, holding that forum non conveniens does not apply in Texas. To accomplish the desired social engineering, they must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers, the so-called doctrine of forum non conveniens. The refusal of a Texas corporation to confront a Texas judge and jury is to be labeled "inconvenient" when what is really involved is not convenience but connivance to avoid corporate accountability.[33]

(29) I do agree with Justice Gonzalez that "sweeping implementations of social welfare policy" are sought here – not by my

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[32] *Id.* at 664.

[33] *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J. concurring).

concurrence but in the unswerving determination of the dissenters to protect the welfare of multinational corporations.[34]

(30) Because the "doctrine" they advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad, I write separately.[35]

(31) It is clear that if anybody is trying to advance a particular social policy, it is Justice Doggett.[36]

(32) I can understand the desire to do equity, but the court's decision today is too one-sided to fall under the rubric of equity. If the court is determined to reach this result, it ought to at least be candid about its reasons.[37]

(33) For every judicial thumb on one side of the scales of justice, the litigant on the opposing scale receives less than his or her due. But out of concern for the plaintiffs' supposed inability to prove their case because of the record before us, the Court has effectively placed the burden of proof on the defendant to negate the cause in

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[34] *Id.* at 680 (Doggett, J., concurring).

[35] *Id.*

[36] *Id.* at 697 (Gonzalez, J., dissenting).

[37] *Williams v. Glash*, 789 S.W.2d 261, 266 (Tex. 1990) (Spears, J., dissenting, joined by Cook and Hecht, JJ.).

fact element of proximate cause, an essential element of plaintiffs' cause of action, thus reversing the burden of proof.[38]

(34) But sympathy is an insufficient and ultimately inequitable ground for statutory construction.[39]

(35) Perhaps this is good policy and precisely what the Legislature intended, although the Court does not seem to think so, since it tries to avoid this result. [. . . wrenching one part of a writing from its context often leaves other parts sharp and twisted, their meaning misshapen. The damage done may be irreparable. It is here, I think, and accordingly, I dissent.[40]

(36) From the unseemly chauvinism of *Davenport* to the blatantly partisan factual recitation of today's plurality opinion, it would appear that some see our Texas Constitution as little more than "a handy grab bag filled with a bevy of clauses that may be exploited" to achieve "some particular social goal." (citation omitted). If I have authored an "expansive writing . . . to dissent from each and every underpinning of" *Davenport*, (citation omitted), it is only because that opinion is so perforated with error, constructs so flawed a foundation

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[38] *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 462 (Tex. 1992) (Cornyn, J., dissenting, joined by Hecht, J.)

[39] *Odle v. City of Denison*, 833 S.W.2d 935, 940 (Tex. 1992) (Phillips, C.J. dissenting, joined by Gonzalez, Hecht and Cornyn JJ.).

[40] *Id.* at 941-42 (Hecht, J. dissenting).

for methodological framework for future decisions.[41]

(37) Its willingness to stretch the rules of appellate procedure to accomplish a desired result in this case, irrespective of the significant consequences to other cases, is less defensible. [. . .] Rulemaking by opinion is not a wise course, to the extent it is even authorized. [. . .] Rulemaking to achieve desirable results in particular cases is even less advisable.[42]

(38) Announced today is an easily manipulable "friends in, foes out" rule to prevent further actions by those who organize to protect taxpayers, consumers or the environment.[43]

(39) The majority ensures that those who pollute will be brought to justice very slowly or not at all.[44]

(40) For today the majority extends a standing invitation to those who would harm our environment to act without fear of citizen challenge in the Texas courts. [. . .] Today the environment is the immediate victim. Those who pollute our rivers, release

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[41] *Ex parte Tucci*, 859 S.W.2d 1, 121 (Tex. 1993) (Phillips, C.J., concurring, joined by Cornyn, J.).

[42] *Piotrowski v. Minns*, 873 S.W.2d 368, 371, 373 (Tex. 1993) (Hecht, J., dissenting, joined by Cornyn and Enoch, JJ.).

[43] *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 443 (Tex. 1993) (Doggett, J., dissenting, joined in part by Spector and Gammage, JJ.).

[44] *Id.* at 458.

toxins into our air, and damage our land cannot be promptly penalized.[45]

b. Members of This Court Frequently Refer to Its Failure to Follow Existing Case Law

(1) Although the evidence addressed here is quite similar to that upheld as legally sufficient in *Yowell* it will not suffice for this majority.[46]

(2) For our broader jurisprudence, it means that the majority continues a disturbing trend of reversing the prior rulings of this Court through mischaracterization and weakening the right to trial by jury.[47]

(3) Today's opinion rewrites the product safety law of Texas to deny protection to those who have "only an eighth grade education," by assuming that such people would "not pay attention to warning labels."[48]

(4) This significant change in our law is not addressed solely to workers in a pipe factory, but extends to all of the more than one million adult Texans with less than a ninth grade education.[49]

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[45] *Id.* 476.

[46] *C&H Nationwide*, 903 S.W.2d at 333.

[47] *Id.* at 333-34.

[48] *Dresser*, 880 S.W.2d at 755.

[49] *Id.*

(5) However, the decision announced today remains wrong now for the other reasons it was wrong before, specifically the same "sweeping anti-consumer alteration of our long-standing method for interpreting insurance policies.[50]

(6) Rejecting all of this, the majority adjusts long-standing Texas law to benefit the insurer to the considerable detriment of the truck driver.[51]

(7) Dismissing this law as mere "tradition," the majority asserts, without citation to any authority, that this Court has not only the authority but the duty to make determinations as to the "basis an insurance company may have had for denying a claim[]."[52]

(8) It would be far more honest for the majority to state openly that it is overruling *Salcedo* – not because that decision's statutory construction and analysis were wrong, or because the legislature failed to acquiesce in it, but because the majority dislikes the result.[53]

(9) The majority engages in the use of legal fiction to construe the language of this statute away – to say that it does not say something it does say – to modify its clear

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[50] *Forbau v. AEtna Life Ins. Co.*, 876 S.W.2d 132 (Tex. 1994) (Doggett, J., dissenting, joined by Hightower and Gammage, JJ.).

[51] *Dominguez*, 873 S.W.2d at 377.

[52] *Id.*

[53] *York*, 871 S.W.2d at 180.

and unambiguous terms. The majority works this smoke-and-mirrors sleight-of-hand by rationalizing that it is not the physical file that counts, but the "mental" informational content, which it concludes is not "tangible."[54]

(10) To say that the utility of that file is not the substantive object of the statute is absurd. This court will henceforth inflict injustice on the citizens of our state meant to be protected by the Tort Claims Act, without regard to the established purpose and meaning of section 101.021.[55]

(11) Today's opinion is but one example of the court's recent indifference to precedent and its commitment to wholesale revision of Texas law.[56]

(12) This seemingly innocuous pronouncement is a device by which this Court can circumvent the Constitution to consider the credibility and weight of the evidence, something known until now only by its true name – a factual sufficiency review.[57]

(13) Substituting its new relevancy analysis for this previously well-established law, the majority arbitrarily and without any explanation declares that evidence Lyons

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[54] *Id.*

[55] *Id.*

[56] *Lyons*, 866 S.W.2d at 602 n.1.

[57] *Id.* at 602.

offers to show bad faith is only evidence of coverage.[58]

(14) Perhaps it will adopt the Court's extensive, and unauthorized, analysis as its own, quoting it at length. Perhaps it will patiently follow every directive the Court has given, however unfair and unreasonable it may seem.[59]

(15) Under the guise of statutory construction, the court today abolishes the doctrine of forum non conveniens in suits brought pursuant to section 71.031 of the Civil Practice and Remedies Code.[60]

(16) Our dilemma is to resolve these competing interests, and we ought to do so openly rather than hiding behind the facade of mutual mistake. [. . .] Finally, almost as a afterthought, the court looks to Texas precedent.[61]

(17) *Johnson* is the sole case upon which the Court relies for its holding, as if legislative disapproval were simply inconsequential.[62]

(18) The Court's statutory construction is hardly reasonable, let alone unambiguous. The Court's improbable view also creates

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[58] *Id.* at 603.

[59] *Lofton*, 777 S.W.2d at 389.

[60] *Dow Chemical Co.*, 786 S.W.2d at 690 (Gonzalez, J. dissenting).

[61] *Williams*, 789 S.W.2d at 265-66.

[62] *Martinez v. Second Injury Fund*, 789 S.W.2d 267, 276 (Tex. 1990) (Hecht, J., dissenting).

> a conflict in the language of the former statute. [. . .] I think it indicative of the weakness in the Court's position that it distorts the case law interpreting the statutory provisions in issue.[63]
>
> (19) Today, the Court ignores this amendment and in effect holds that a fact finder can look to cohabitation and holding-out as circumstantial evidence of an agreement to be married. This approach is identical to the process of inferences that the legislature repealed. [. . .] Both the *Russell* court and this Court ignore the intent of the legislature in amending the statute. [. . .] To suggest, as the Court does today, that the legislature meant that proof of cohabitation and holding-out no longer gives rise to an inference of an agreement to be married, but now is circumstantial evidence of that agreement, flies in the face of reason.[64]
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> (20) The Court cannot, of course, find a single case which reaches this result in anything like the present circumstances. The reason for this, it seems to me, is that the Court's view is exactly the apposite of what the law should be. [. . .] The Court is determined to avoid the principal issue in the case.[65]

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[63] *Tijerina v. City of Tyler*, 846 S.W.2d 825, 829-31 (Tex. 1992) (Hecht, J., dissenting, joined by Cornyn, J.).

[64] *Russell v. Russell*, 865 S.W.2d 929, 934-36 (Tex. 1993) (Gonzalez, J., dissenting, joined by Hecht, J.).

[65] *Goodyear Tire & Rubber Co. v. Portilla*, 870 S.W.2d 47, 52, 54 (Tex. 1994) (Hecht, J., dissenting).

(21) I seriously doubted whether the Court meant what it said in *Davenport*. Today's decision is proof it did not.[66]

(22) Today precedent and tradition have been trampled as the majority's long-standing fear of ordinary people in our legal system has taken firmly hold.[67]

(23) Nor is the majority restrained by Texas decisional law validating similar requirements.[68]

c. Members of This Court Frequently Refer to the Excessive Time on Appeal Many Cases Pend.

(1) While I do not quarrel with the power of four members of the Court to grant any application or motion for rehearing they deem worthy, I do object to the unconscionable delay in doing so in these two cases.[69]

(2) The delay in these two cases cannot be justified.[70]

(3) The litigants and the people of this State have every right to expect and demand

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[66] *Tilton v. Marshall*, 925 S.W.2d 672, 694 (Tex. 1996) (Gonzalez, J., concurring in part and dissenting in part).

[67] *Texas Ass'n of Business*, 852 S.W.2d at 453.

[68] *Id.* at 457.

[69] *State Farm Fire & Casualty Co. v. Simmons*, 40 Tex. Sup. Ct. J. 791, 930 (July 10, 1997) (Cornyn, J., dissenting on granting of motion for rehearing, joined by Spector, Baker, and Abbott, JJ.).

[70] *Id.*

that this Court perform its duties in a timely manner.[71]

(4) What happened to Sheila Twyman in this case involves grossly offensive conduct which warrants judicial relief and the length of time it took this Court to decide this case is regrettable.[72]

(5) Over five years ago, a trial court issued a divorce decree that included an award to Sheila Twyman of $15,000 for the years of abuse she had suffered at the hands of her husband. AT the time, the award was consistent with prevailing Texas law. Today, the plurality sets aside the trial court's award and sends Sheila Twyman back to start the process over in a new trial. Because justice for Sheila Twyman has been both delayed and denied, I dissent.[73]

(6) The delay in announcing the majority's opinion has been totally unnecessary and unjustified.[74]

(7) A dilatory resolution of the issue presented not only disserves the litigants before us, but also breaches the public's

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[71] *Id.*

[72] *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993) (Gonzalez, J., concurring).

[73] *Id.* at 626 (Spector, J., dissenting, joined by Phillips, C.J. and Hecht, J.).

[74] *Delaney v. University of Houston*, 835 S.W.2d 56, 61 (Tex. 1992) (Doggett, J., dissenting, joined by Mauzy, J.)

trust in performing the duties of the judiciary in a timely and responsible manner.[75]

(8) When the "traditions" of this Court cannot produce expeditious and fair resolution of litigation, they must be changed.[76]

(9) Everyone would be better served by fewer excuses and more leadership in getting the important work of this court accomplished.[77]

(10) Indeed, they conveniently disregard another Code requirement that "[a] judge should dispose promptly of the business of the court." [. . .] Like the majority's recent delay in another case, "justice delayed [has been] justice denied."[78]

(11) To the extent that this case is about standing, it is about standing still[.][79]

(12) The wheels of justice grind slowly, with final resolution often years in reaching. Indeed, in this court they sometimes grind hardly at all. Clearly those willing to profit from polluting our natural resources will not hesitate to employ the delays in the judicial system to their advantage.[80]

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 61-62.

[79] *Texas Ass'n of Business*, 852 S.W.2d at 476.

[80] *Id.* 456.

d. Members of This Court Frequently use Negative Metaphor to Describe the Court and Its Actions.

(1) In a strange quirk, contrary to this heritage, the court has concluded that our Texas Constitution mandates Texas taxpayers to subsidize a Swiss corporation.[81]

(2) A distinguished, or rather, a noted ex-judge of this state, a short time ago declared that, "None but fools and poor men ever pay taxes in Texas," and the records at the Comptroller's Office appear to prove the truth of the assertion.[82]

(3) Our constitutions are made and governments are instituted for the benefit and protection of the people and not to foster monopolies and fatten corporations.[83]

(4) In again rejecting Amy's plea for relief, the majority leaves all Texans without the security that should be at the very core of health insurance.[84]

(5) Today's opinion and the insurance company's investigation, which forms the basis for this bad faith claim, share much in common – both are perfunctory and both mislead through omission.[85]

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[81] *HL Farm Corp. v. Self*, 877 S.W.2d 288, 293 (Tex. 1994) (Doggett, J., dissenting).

[82] *Id.* 295.

[83] *Id.* 297 n.6.

[84] *Forbau*, 876 S.W.2d at 132.

[85] *Dominguez*, 873 S.W.2d at 377.

(6) The majority today continues its practice of wearing blinders when evaluating facts not helpful to insurance companies while violating the constitutional mandate that review by this Court is limited to legal, not factual, sufficiency. Once again, as in *Boyles v. Kerr*, [. . .], "excessive concern for the effect of every opinion on insurance companies seems to have become the predominant and overriding" concern of this majority.[86]

(7) Today's writing represents the next step in the dismemberment of Texas consumer product safety law. Having so recently declared that certain previous guarantees of that law are available neither to those Texans with limited education nor to those who labor under hot, sweaty working conditions, the majority now eliminates a safeguard for another class of our citizens. No longer will our law offer comprehensive protection to a consumer provided an inadequate warning of product limitations. And, since, even this abrupt change is not enough to assure General Motors' victory, the majority must also resolve an issue never even raised in this Court.[87]

(8) Instead, today's opinion only attacks its own self-created silly strawman – the unrealistic best and brightest warning – and simplistically announces that one cannot presume that a person would have

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[86] *Id.* at 379 (citation omitted).

[87] *Saenz*, 873 S.W.2d at 362.

heeded a better warning, when, in fact, he paid no attention to the warning given.[88]

(9) I would not so callously disregard our prior rulings in favor of decision-making by cliché.[89]

(10) Equally bizarre is the way today's opinion addresses a product manufacturer's duty.[90]

(11) And so the majority once again pens more answers than the parties have proper questions.[91]

(12) I strongly object to this roughshod treatment of one whose role is vital to public education.[92]

(13) Instead of reasoned discussion, the majority applies a catchword.[93]

(14) Such use of the term "extreme" merely provides another elastic device of an appellate court to sweep away any evidence inconsistent with the result it wants.[94]

(15) Note 4 merely represents the method contrived for this particular case to vaporize

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[88] *Id.*

[89] *Id.* at 363.

[90] *Id.* at 366.

[91] *Id.*

[92] *Dodd*, 870 S.W.2d at 9.

[93] *Wal-Mart*, 868 S.W.2d at 334.

[94] *Id.*

the live testimony of three Texans in order to justify a preconceived result.[95]

(16) Mail order justice – the kind that comes with a stamp and no opportunity to be heard – could and should have been discouraged by this Court.[96]

(17) Today the Court issues mandamus to correct a ruling the trial court never made on an objection to discovery which relator, the discovering party, never opposed. To this unprecedented, unworkable and unreasonable result, I dissent.[97]

(18) Before now, I was aware of no procedure by which the Court could unilaterally change the parties in a case to suit itself, without motion or argument by any party.[98]

(19) It is the height of deception to suggest that docket backlogs in our state's urban centers are caused by so-called "foreign litigation."[99]

(20) Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. [. . .] Their efforts are finally rewarded.

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[95] *Lyons*, 866 S.W.2d at 604.

[96] *Adamo*, 864 S.W.2d at 491.

[97] *Loftin*, 776 S.W.2d at 148.

[98] *Id.* at 149.

[99] *Dow Chemical Co.*, 786 S.W.2d at 686 (Doggett, J., concurring).

Today they hit pay dirt in Texas. No reason exists, in law or in policy, to support their presence in this state.[100]

(21) The benefit to the plaintiffs in suing in Texas should be obvious: more money, as counsel was candid enough to admit in oral argument.[101]

(22) What advantage for Texas does the Court see, or what advantage does it think the Legislature envisioned, that no other jurisdiction has seen, in abolishing the rule of forum non conveniens for personal injury and death cases? Who gains? A few lawyers, obviously. But who else? If the Court has good answers to these questions, why does it not say so in its opinion? If there are no good answers, then what the Court does today is very pernicious for the state.[102]

(23) The Court cannot point to a shred of evidence which, by itself, implies that John Culpepper was the alter ego of Culpepper Properties. Instead, it takes various bits and pieces of evidence, each of which is no evidence of alter ego, adds them together, notes that Mancorp thought John Culpepper might be Culpepper Properties' alter ego, and comes up with evidence of alter ego. Nothing plus nothing plus nothing is still nothing, no matter how hard you believe, or hope, that it may

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[100] *Id.* at 697 (Cook, J., dissenting).

[101] *Id.* at 706 (Hecht, J., dissenting).

[102] *Id.* at 707.

> be something. [. . .] Several smoldering sticks, no one of them flaming, may together build a fire. But all the sticks there are, piled up without spark or heat, make neither smoke nor fire; they are nothing but a big pile of sticks, and one cannot infer from the pile that they must be afire.[103]

(24) By suggesting that the solecism, "his self", implies that John Culpepper and Culpepper Properties are one and the same, the Court shows how far it is willing to grope for evidence of alter ego.[104]

(25) This misapplication of public funds is required, according to the Court, because the Legislature clearly intended for taxpayers to pay public employees for not working. This is nonsense.[105]

(26) To the extent they are important in our analysis, they do not, on balance, support the Court's position, and its claim to the contrary is demonstrably false. Finally, the Court dismisses the argument that its view is absurd as being nothing more than a disagreement over the policy chosen by the Legislature. This, too, is merely rhetorical sleight. [. . .] The Court misstates the issue because it cannot understand this

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[103] *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 231, 234-35 (Tex. 1990) Hecht, J., dissenting, joined by Phillips, C.J.).

[104] *Id.* at 233.

[105] *Tijerina*, 846 S.W.2d at 829.

distinction or because it is afraid of the weakness of its position.[106]

(27) While requiring a mere nine paragraphs to explain his own rationale for agreeing with the judgment entered today, Chief Justice Phillips writes at length about a guarantee of the Texas Constitution that he then chooses to ignore completely, since he is personally unable "to articulate its meaning with confidence."[107]

(28) But Chief Justice Phillips will have none of this. [. . .] So devoid of historical support is Chief Justice Phillips that he must cite to an article whose very title contradicts his opinion and speaks to what is special about this state – Rampant Individualism in the Republic of Texas. [. . .] He prefers to denigrate the work of the Texas drafters of that same era on the unusual grounds that they must have considered the constitutional experience of others and because the strong language they chose in 1836 did to attract the enthusiasm of one historian a century later.[108]

(29) Interestingly, Chief Justice Phillips' primary expert on our state's history of freedom of expression is the occupying Union General during Reconstruction, who advances the quite preposterous claim that such freedom "had never existed in Texas

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[106] *Id.* at 831.

[107] *Ex parte Tucci*, 859 S.W.2d at 27 (Response of Court to concurrence of Phillips, C.J.).

[108] *Id.* at 32-33.

(citation omitted)." [. . .] The consternation expressed in today's concurrence is hardly limited to *Davenport*; what really seems to upset Chief Justice Phillips is a decade of our important related jurisprudence. [. . .] Typical of the concurrence's misuse of authority, this phrase is pulled from (citation omitted).[109]

(30) Unlike the plurality opinion, however, I do try to explain the rationale for my differences.[110]

(31) The solution wrought by the Court today must certainly leave the parties and the trial court slack-jawed. [. . .] In the process, they ignore the Court's role as arbiter and run roughshod over other vital rights.[111]

(32) The Texas tort of bad faith is – to borrow Judge Alex Kozinski's observation in a related context – "so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window than a rule of law." (citations omitted). The only flaw in Judge Kozinski's metaphor is the implication that bad faith liability is limited to hapless passersby. A more accurate comparison

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[109] *Id.* 41, 43-44, 50, n. 43.

[110] *Id.* at 60, n.5 (Phillips, C.J., concurring, joined by Cornyn, J.).

[111] *Tilton*, 925 S.W.2d at 695-96 (Enoch, J., concurring in part and dissenting in part, joined by Hecht and Gonzalez, JJ.).

would be to an assault weapon fired into a crowd at random.[112]

(33) For plaintiffs, bad faith is more like Hollywood television's Wheel of Fortune, or closer to home, like the Texas lottery: it costs almost nothing to play, you can play whenever you want, and if you win you hit the jackpot – tens, maybe hundreds, of thousands of dollars for the awful mental anguish that invariably seems to accompany denial of even the smallest insurance claim, and millions in punitive damages.[113]

(34) Why is the threat viable in every case filed? Because this Court will not define the limits of the tort. [. . .] This conflict should be resolved, instead, the Court adds to the confusion. [. . .] The Court's rationalizations are approaching doublespeak. [. . .] [B]ut I would have preferred to derive that right from established principles of contract law, or to have relied on statutory remedies, rather than to create a new tort and, like Dr. Frankenstein, take our chances. [. . .] The bad faith tort in Texas does not meet this standard, and it is the Court's fault.[114]

(35) The arbitrariness in this case is not in the insurer's conduct but in the cause of

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[112] *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 453 (Tex. 1997) (Hecht, J., dissenting, joined by Phillips, C.J. in all but Part I, Gonzalez and Owen, JJ.).

[113] *Id.*

[114] *Id.* at 454.

action. Our opinions today demonstrate that bad faith liability is as unpredictable as injury from a brick thrown out of a window or a gun fired into a crowd.[115]

(36) Today's opinion delivers a double whammy to protection of our natural resources.[116]

(37) Texans understand the directive "Don't Mess With Texas"; the majority does not. If the mess is big enough, if the stench is strong enough, no matter how great the danger to public health and safety, an industrial litterer can "mess" with Texas without fear of immediate punishment or legally effective citizen action.

(38) The mess in Texas is not only with our environment but with the misinterpretation of the law.[117]

3. The Court Has Rewarded – Not Punished – Other Lawyers for Similar Language.

Conduct such as that at issue here has not been punished by this court. Indeed, often the Court has rewarded such conduct. Respondents' Counsel ask the Court to take judicial notice of its file in *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984) (op. on reh'g) (Cause No. C-0771). In the *Manges* case, attorneys for the Guerra family filed, among other things, a motion for rehearing

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[115] *Id.* at 463-64.

[116] *Texas Ass'n of Business*, 852 S.W.2d at 453.

[117] *Id.* at 476.

and three motions to recuse sitting Justices Kilgarlin, Ray, and Robertson. All of these motions raised issues of bias and result-orientation arising from political favoritism and campaign contribution. In the Guerra's motion for rehearing, the Guerra's counsel included as a point of error on rehearing. "The court erred by denying Respondents a fair trial in this court and by depriving Respondents of a fair trial by a jury in the trial court, and thus has denied Respondents constitutional due process." (Guerra motion for rehearing at 3.) Counsel for the Guerra family then opened his argument as follows:

> Five justices of this State's highest court, however honest in their daily conduct as men and judges, are deliberately permitting a litigant who is convicted of fraud by a jury of his peers in his own bailiwick to walk away with his loot of millions while throwing a bone to those he has defrauded. [. . .] If this Court thinks for one moment that by reforming the Manges-to-Manges lease it has restored to Respondents their share of all of the ill-gotten gains of their self-dealing leasing agent, it is living in a fantasy world concerning the profitable use to which the holder can by assignment put the lease the Court has validated. [. . .] [T]he Court has invented a new standard of conduct between the executive and the mineral owner which rescues Manges from a situation of his own making by his greed and self-dealing. [. . .] The concern the five justices feel is for an agent who has been convicted by a jury of defrauding his principals into contracting with him in the first instance and thereafter visiting upon them five different acts of "malicious and wanton" conduct in "willful and unconscionable

> disregard of their rights and interests," all noticeably unmentioned in the Court's opinion. That concern is hardly understandable by his victims. Neither is it in keeping with the Court's long tradition of protecting the victims of abused trust and confidence.

(Guerra motion for rehearing at 4, 5, and 6.)

As opposed to Kelly, who has lost on rehearing, the rhetoric of the Guerra family's motion for rehearing resulted in a complete turnaround by the Court in their favor. *See Manges v. Guerra*, 673 S.W.2d at 180. And, unlike Respondents' Counsel, who today stand accused of contempt, the Guerra family's counsel long have been esteemed as having pressed their position on rehearing and caused a watershed change in the Court's history.

Even in more recent cases of bitter invective, the Court prudently has chosen not to penalize an attorney's exercise of his First Amendment rights. Again, Respondents' Counsel ask the Court to take judicial notice of its own files, this time general correspondence. Earlier this year, Dallas Attorney Michael W. Shore wrote the Court regarding its decision in *Saint Luke's Episcopal Hospital v. Agbor*, 952 S.W.2d 503 (Tex. 1997). In his letter, Mr. Shore wrote:

> For the past four (4) years the Court seems to have been intent on making it more difficult for normal people to obtain compensation for their injuries from doctors, lawyers, insurance companies and products manufacturers. [. . .] To call *Agbor* unprincipled is a vast understatement. To call it another in a series of Texas Hospital Association *political* favors is probably more accurate. Some of you may be pocketing

> the big business contributions and rationalizing your actions by telling yourselves that you are only "swinging the pendulum back to the middle." However, by legislating for business and professional interests from the bench the way prior courts backed by trial lawyers legislated for the consumer does not make either Court look as it should – impartial.

(*See* Michael W. Shore letter to Court (dated July 7, 1993)). Respondents' Counsel understand from Mr. Shore that this Court has taken no action – contempt or grievance – against him to date. Yet, his submission to the Court was not even in connection with any client representation and he was under no duty to act as a zealous advocate.

Penalizing Respondents' Counsel for the same conduct as other attorneys who are not penalized violates their First, Fifth, Sixth, and Fourteenth Amendment rights. Selective prosecution by way of laws that affect an individual's right to free speech constitutes a denial of substantive due process. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), and *Thornhill v. Alabama*, 310 U.S. 88, 95-96 & nn. (1940). This Court has not held in contempt, sanctioned, or referred to the Grievance Committee other attorneys for similar conduct. Respondents' Counsel respectfully submit that it should not do so here.

Truly, Respondents' Counsel believe, in a case as controversial as *Havner*, involving matters of the sufficiency of "novel scientific evidence," – issues upon which Justice Hecht himself has questioned the political motivations of his fellow justices (*Maritime Overseas Corp. v. Ellis*, 40 Tex. Sup. Ct. J. 110, 113-14 (Nov. 15, 1996) (Hecht, J.,

dissenting on denial of application for writ of error) – the Court should not be, as Justice Gonzalez puts it, "trigger happy" to penalize Respondents' Counsel. Rather, given the long history of – not to mention relevancy of – comment on motivation and political bias on the part of the judiciary when creating new law, Respondents' Counsel only have followed in the footsteps of "big firm" attorneys now considered heroes of judicial reform – not to mention the writings of this Court.

4. Texas Law Provides That Only the Signatory Can Be Sanctioned for Language in Pleadings.

"Rule 13 applies only to pleadings, motions and other papers signed by attorneys." *GTE Communications Systems Corp. v. Tanner,* 856 S.W.2d 725, 730 (Tex. 1993) (Hecht, J.). "Rule 13 prescribes that courts presume that papers are filed in good faith. Thus, the burden is on the party moving for sanctions to overcome this presumption." *Id.* Likewise, § 10.001-.006, Tex. Civ. Prac. & Rem. Code, applies only to the signing attorney or party. *See* § B.1., above. Accordingly, the Respondents' Counsel believe that the Court may not sanction neither Mr. Nace nor Ms. Hamilton under Rule 13 or § 10.001.

5. Given the Circumstances Here, the United States and Texas Constitutions Protect Kelly and Her Counsel From Sanctions Based on Their Choice of Language.

"The history of the power to punish for contempt and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and

of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 373 (1947) (citations omitted). Any decision by this Court to punish Respondents' Counsel calls into play the protections of the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as the free speech, open courts, and due course of law provisions of the Texas Constitution. *See* U.S. Const. amends. I, V, VI, and XIV, and Tex. Const. art. I, §§ 8, 13, and 19.

As an initial matter, it is important to note *whose* constitutional rights are affected – not merely implicated – by the Court's threatened punishment: first and foremost lie the rights of Kelly Havner. "Most importantly, the rights of litigants may not be infringed by the abusive exercise of this power." *Kutch v. Del Mar College*, 831 S.W.2d 501, 510 (Tex. App. – Corpus Christi 1992, no writ). To the extent that she has been punished for Respondents' Counsels' conduct, Respondents' Counsel urge the Court to again rehear the legal issues and punish Respondents' Counsel only. Respondents' Counsel respectfully submit that this Court *did* create new law and Kelly *should* have a new trial. No language by her attorneys should alter this and, to the extent such may have occurred, her federal First and Sixth Amendment rights have been compromised, as well as her rights under article I of the Texas Constitution.

Kelly prevailed before the Corpus Christi Court of Appeals because of an emotional and vehement motion not unlike the one at issue here. That Court rewarded her efforts to catch their attention with a complete rev[illegible]rsal of

position in her favor. If this Court should decide to punish Kelly and Respondents' Counsel as the Show Cause Order portends, it will chill their efforts to pursue her case further, such as to the United States Supreme Court by, among other things, requiring them to focus their energies on their self-defense when they should be preparing further appellate papers.

Of additional importance are the First, Fifth, Sixth, and Fourteenth Amendment rights of Respondents' Counsel, and the attorneys and litigants throughout Texas with cases on appeal. *See also* Tex. Const. art. I, §§ 8, 13, and 19. Appellate attorneys' efforts will be chilled should the Court sanction or otherwise find Respondents' Counsel in contempt here. This is the most serious implication of the Court's decision. For example, Rebecca E. Hamilton, one of Respondent's Counsel, has shown a copy of pages 8, 14, and 16 of the Second Motion for Rehearing to several local attorneys – all members of the defense bar. (These are the pages to which Ms. Hamilton contributed that the Court notes as being of concern.) Not one could ascertain the language the Court perceives as contemptuous and sanctionable.

Of equal importance, "It is recognized that persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.) (citing *New York Times*

Co. v. Sullivan, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964)). Respondents' Counsel respectfully remind the Court that, "Any bridle upon a free flow of information to the people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval." *Semaan*, 508 S.W.2d at 432.

C. Neither Mr. Hilliard's Nor Ms. Hamilton's Conduct Is Grievable.

While it appears that this honorable Court can refer any attorney to the Grievance Committee any time it believes it should, Respondents' Counsel urge that it not do so in this case. For one thing, the chilling effect upon attorneys' First Amendment rights again comes into play. For example, among the pages cited by the Show Cause Order as of "particular concern" are pages 8, 14, and 16 of the Second Motion for Rehearing. Yet none of the pages reflects any language that Respondents' Counsel can discern as being in violation of *any* rule.

If attorneys are unable to discern what conduct will result in their referral to the Grievance Committee, their First Amendment rights, as well as their clients' right to zealous advocacy, have been chilled out of fear of punitive attack. Respondents' Counsel ask the Court to consider the former Ethical Consideration, which expressly recognized that "the right of a lawyer as a citizen to publicly criticize adjudicatory officials if motivated by desires to improve the system, and if done in a proper manner." Tex. Gov't Code Ann. art. 10, § 9, EC 8-6 (State Bar Rules [Texas Code of Professional Responsibility])

(Vernon 1988), *repealed* 1990. As the San Antonio Court of Appeals noted, "Such right is particularly meaningful where, as in Texas, the adjudicatory officials are selected through the elective system." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.). Further, as Respondents' Counsel said nothing in the Second Motion for Rehearing that this Court has not said about itself, and caused no disruption of the administration of justice, Respondents' Counsel do not believe it can be said that Counsel acted in an grievable manner.

Respondents' Counsel conclude by quoting Justice Enoch, who has opined:

> It is all the rage to criticize lawyers and attribute denigration of the legal profession to the unscrupulous tactics of the "Rambo" lawyer. What many people, both within and outside the legal community, fail to grasp is that the maladies of the profession are not exclusively, or even primarily, attributed to the zealous advocate. Rather, the lawyer is part of an adversarial system that arms the attorney with various rules which encourage, and sometimes require, the lawyer to use the very tactics that subject the profession to overwhelming criticism. *Furthermore, there is a real tension in a system that places a duty on a lawyer to zealously advocate on behalf of the client while simultaneously observing a duty to the court.*

Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. Rev. 199, 199-200 (1994) (emphasis added).

D. This Court Should Take No Action Pursuant to Its Show Cause Order Because Both Due Process and Due Course of Law Protections Have Not Been Afforded to Respondents' Counsel.

1. The Court Denied Respondents' Counsel a Hearing.

"[D]ue process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense – a right to his day in court. . . . " *See Holt v. Virginia*, 381 U.S. 131, 136 (1965) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)), and *Ex parte Carney*, 903 S.W.2d 345, 346 (Tex. 1995) (*per curiam*) ("Due process of law demands that before a Court can punish for a contempt not committed in its presence, the accused must have full and complete notification of the subject matter, and the show cause order or other means of notification must state when, how and by what means the defendant has been guilty of the alleged contempt.") (quoting *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969)); *see also Ex parte Alloju*, 907 S.W.2d 486, 487 (1995) (*per curiam*) (addressing whether a person may be held in contempt if the sanction imposed is coercive only and not punitive and holding that, regardless of whether coercive or punitive, the accused contemnor must have hearing before the Court). Here, the Court has denied Respondents' Counsel both.

In *Ex parte Chambers*, this Court held that notice and hearing with evidence was necessary in a case of direct, criminal contempt. 898 S.W.2d 257, 259-60 (Tex. 1995). Clearly, then, in a case of indirect, constructive contempt,

based on the "tenor" of an attorney's briefing, notice and an evidentiary hearing are necessary.

2. The Court Has Not Granted Respondents' Counsel a Jury.

Respondents' Counsel believe that they are entitled to a jury to ascertain the truth or reckless disregard, if any, of the Second Motion for Rehearing. *See Holt v. Virginia*, 381 U.S. 131, 136 (1965) (noting that the contemnor was constitutionally deprived by his lack of opportunity to prove the truth or falsity of his charges against the court of bias), and *Ex parte Sproull*, 815 S.W.2d 250 (Tex. 1991) (accused contemnor entitled to a trial by jury under Sixth Amendment if major offense); *see also Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984) ("The Sixth Amendment to the United States Constitution guarantees the right to jury trials for serious offenses, but not petty offenses.") (quoting *Muñiz v. Hoffman*, 422 U.S. 454, 475-76 (1975)), and *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983) ("[P]rocedural safeguards for contempt do not derive from the sixth amendment, but arise under traditional notions of due process.").

In *Ex parte Johnson*, this Court held that, "The right to be present at trial and confront witnesses is fundamental and essential to a fair trial." 654 S.W.2d 415, 421 (Tex. 1983) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). It further observed that, "The right is protected under Texas law by article 1, section 10 of the Texas Constitution." *Johnson*, 654 S.W.2d at 421. Respondents' Counsel merely ask for the same rights afforded thousands of Texans each day, who face loss of liberty and property.

3. The Court Declined to Specify What It Finds Objectionable in the Second Motion for Rehearing.

In *Ex parte Carney,* this Court addressed the specificity of a "show cause order that referred to a motion" for "contempt and sanctions" "but provided no additional information to Carney." The motion claimed that contempt and sanctions were warranted because " 'Carney had not forwarded to the Sheriff all the documents and items ordered for turnover; and had failed to appear for his deposition." 903 S.W.2d 345, 346 (Tex. 1995) (*per curiam*). This Court observed that:

> While the turnover order itself was relatively specific, the motion for contempt did not state how Carney had failed to comply with the order other than stating that Carney had not forwarded to the Sheriff all documents and items ordered. The motion for contempt did not give Carney full and complete notice of the subject matter of the motion, and it did not give Carney notice of when and how, and by what means he was guilty of contempt. And, as mentioned above, the court's order to show cause on the motion for contempt did not state what alleged noncompliance would be considered during the hearing."

Id.

"Full and unambiguous notice of the accusation of contempt must be served on the alleged contemnor." *Ex parte Chambers,* 898 S.W.2d 257, 262 (Tex. 1995) (quoting *Ex parte Adell,* 769 S.W.2d 521 (Tex. 1989)). Respondents' Counsel submit that they are entitled to adequate notice, as well.

4. The Court Should Recuse Itself.

This Court should recuse itself as to the grievance issues because, "The Grievance Committee is an administrative agency of the judicial department and is the arm of the Supreme Court in the discharge of its professional policing duties." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 434 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.), and *State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972). A referral by this Court of Respondents' Counsel to the Grievance Committee is a referral of them to itself. The Court thus should recuse itself and allow another judicial body to make such a decision.

This Court should recuse itself as to the contempt, grievance, and/or sanctions issues because of the factual matters regarding which Respondents' Counsel are entitled to an evidentiary hearing and jury. The Show Cause Order threatens Respondents' Counsels' ability to practice law, to engage in free speech, and already has damaged their good reputations in the legal community. The Court has denied them a hearing. If the Honorable Court reconsiders and allows Respondents' Counsel the fundamental right to adduce evidence in support of the truth, or the lack of reckless disregard thereof, of the language in the Second Motion for Rehearing, another court should sit to hear the evidence. Further, Justice Gonzalez already has spoken about this pending matter to the media, making both factual and opinion statements relevant thereto. (*See* Exhibit 3.)

Accordingly, pursuant to Rules 16.1-.3 of the Texas Rules of Appellate Procedure, Respondents' Counsel move the Court to recuse itself *as a body*. Respondents'

Counsel respectfully refer the Court to Rule 18b(2)(a) and (b), Texas Rules of Civil Procedure. Alternatively, Respondents' Counsel move Justice Gonzalez to recuse himself from any deliberation as to this matter, because of his comments to the media. Respondents' Counsel respectfully refer Justice Gonzalez to Rule 18b(2)(d), Texas Rules of Civil Procedure

5. The Court Should Refer to Another Court the Issue of Whether It Should Be Recused.

Rule 16.3 of the Texas Rules of Appellate Procedure provides:

> Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges siting *en banc. The challenged justice or judge must not sit with the remainder to consider the motion as to him or her.*

Tex. R. App. P. 16.3(b) (emphasis added). Although the rule does not explicitly envision the procedure applicable when a movant seeks a recusal of an entire court, such motions are not without precedent. *See Hutcherson v. Woodmen of the World,* 112 Tex. 551, 251 S.W. 491 (1923). Clearly, the Court should act as its predecessors and certify the issue of recusal to another court or another judicial body and allow them to resolve the recusal issues.

III.

CONCLUSION

In *Thornhill v. Alabama,* the United States Supreme Court observed that:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Respondents' Counsel agree that courtesy and decorum are essential aspects of the practice of law. Respondents' Counsel have the utmost respect for the Texas justice system and the rights for which that system is responsible to protect. Respondents' Counsel also have the utmost respect for the role of attorneys as zealous advocates for those who suffer harm at the hands of others, as Kelly surely did in this case.

Respondents' Counsel dispute, however, whether an attorney can be held in contempt and otherwise sanctioned for word, on paper, filed with a Court that failed to react for nearly half a year. Respondents' Counsel

further dispute that any of the language in the Second Motion for Rehearing was boisterous or disruptive of the administration of justice. Finally, Respondents' Counsel would urge the Court that the sanctity of the First Amendment should not be compromised by what may be perceived as merely hurt feelings.

WHEREFORE, PREMISES CONSIDERED, Respondents' Counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, respectfully request that this Court decline to enter an order of contempt or sanctions, that it decline to refer this matter to the Grievance Committee of the State Bar of Texas, and that it take no action penalizing Mr. Barry J. Nace for his participation in representing Kelly Havner. Alternatively, Respondents' Counsel ask for adequate notice of their alleged wrong-doing, and evidentiary hearing at which a jury may decide all factual issues, and that the Court refer the issue of whether it recuse itself to another judicial official, unless it decides at this time to recuse itself as a body.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

/s/ Todd W. White

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State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 08837050
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Tel.: 972/771-8011
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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Response on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States Mail on this the 4th day of December, 1997.

/s/ Todd W. White
Todd W. White

VIA UNITED STATES MAIL
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VIA UNITED STATES MAIL
Guy H. Allison
THE ALLISON LAW FIRM
920 Leopard Street
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VERIFICATION

STATE OF TEXAS)
)
COUNTY OF ROCKWALL)

On this the 3rd day of December, 1997, Rebecca E. Hamilton appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath, she said she had read this the Response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response"), and that the facts pertaining to the Motion to Recuse portion of the Response are within her personal knowledge and are true and correct. Ms. Hamilton further attested that the Exhibits attached to the Response are true and correct copies of the originals.

/s/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO and SUBSCRIBED before me, the undersigned Notary Public, on the 3rd day of December, 1997, to certify which witness my hand and seal.

(Seal) NANCY SEMPLE
MY COMMISSION
EXPIRES
JUNE 30, 2001

/s/ Nancy Semple
Nancy Semple
Notary Public in and for
the State of Texas
Rockwall County

CAUSE NO. 13-92-00540-CV

**IN THE COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL
DISTRICT CORPUS CHRISTI, TEXAS**

MERRELL DOW PHARMACEUTICALS, INC.,

Appellant

VS.

**ERNEST HAVNER AND MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD KELLY HAVNER,**

Appellees

APPELLEES' RESPONSE TO MERRELL'S OPPOSITION TO APPELLEES' MOTION FOR REHEARING AND EN BANC CONSIDERATION

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**ATTORNEYS FOR APPELLEES
ERNEST HAVNER AND MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER**

DELIVERED APR. 21, 1994

CAUSE NO. 13-92-00540-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Appellant

VS.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Appellees

APPELLEES' RESPONSE TO MERRELL'S OPPOSITION TO APPELLEES' MOTION FOR REHEARING AND EN BANC CONSIDERATION

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

Your Chief Justice has signed an Opinion which flatly ignores and frequently misstates the evidence presented by Plaintiffs at the trial level (see Appellees' Motion for Rehearing and Appellees' Motion for En Banc Reconsideration). To assure Merrell Dow enjoyed immunity from the jury's verdict, this Opinion had to first betray the citizens of Texas; Texans, who now have as the law in their State an Opinion that first left the record unread, then allowed pertinent law to remain shelved, and ultimately redefined logic. This Court has voted to throw out a carefully deliberated verdict of the citizens of Nueces county, a verdict which by even the most elementary

reading of the record is supported by the evidence, a verdict which with just a general understanding of the applicable case law demanded affirmation. Remarkably, even the Texas Rules of Evidence could not bridle this runaway Opinion. Instead, this Opinion serenades a company that, for profit, thoughtlessly and without remorse poisoned American mothers and caused their children to live lives with terrible birth defects. In an attempt to support conclusions which seem to echo the champagne toasts of Merrell Dow's boardroom we are confronted with reasoning reflective not of the current law in the area, but only of the current political climate under which our State now finds itself. Clearly, this Opinion exhibits no appellate concern for the law nor the record (see Appellees' Motion for Rehearing and Appellees' Motion for En Banc Reconsideration). Either because of personal experience with Bendectin by someone who had influence in this Opinion or a clear outcome oriented mindset, Kelly Havner and the jury that heard her case, find themselves frustratingly powerless. To flick away the verdict of this jury as if it were of no greater import than lint on the sleeve of a black robe, as if the hard work of these twelve Corpus Christi jurors who faithfully contributed more than a month of their lives to the case because they believed it their duty to do so, sends a clear message to Big Business: Fear neither the law nor the record nor the trial judge nor the jury. Especially have no concern for little blue-eyed Kelly Havner whose body you mutilated while she was still in the one place she should have been safe – her Mother's womb. Big money, higher office and a fondness for the personal attention and flirtations of Merrell Dow's attorney during oral argument have

outweighed the facts, the jury's verdict and even, amazingly, our own United States Supreme Court (see Appellees' Motion for Rehearing and Appellees' Motion for En Banc Reconsideration). Finally, this Opinion is not only a ridiculously thinly veiled microphone for Merrell Dow, but also is responsible for a medical first; it turns a birth defect into a miscarriage.

Respectfully submitted,

HILLIARD, GRILLO
& MUÑOZ, L.L.P.

By: /s/ Robert C. Hilliard
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ATTORNEYS FOR APPELLEES ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that a true and correct copy of APPELLEES' RESPONSE TO MERRELL'S OPPOSITION TO APPELLEES' MOTION FOR REHEARING AND EN BANC CONSIDERATION has been provided to all counsel of record listed below, and our jury in the manner specified, on this the 21st day of April, 1994.

/s/ Robert C. Hilliard
Robert C. Hilliard

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12. John Andreas Mourelatos
    525 Texas Ave.
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NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Respondents,

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

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ATTORNEYS FOR RESPONDENTS ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD,

KELLY HAVNER

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Respondents,

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

TO THE SUPREME COURT OF TEXAS:

Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner, under the authority of the United States and Texas Constitutions, Tex.R.Civ.P. 18b, Tex.R.App.P. 15 and 15a, file this motion to recuse Justice James A. Baker from this cause.

1. Respondents ask that Justice Baker be recused from further participating in or voting on this case for the following reasons. On March 26, 1996, only seven days

after oral argument and prior to this Court issuing its opinion, Justice Baker's campaign mailed-out a funds solicitation letter to lawyers across the State. The letter identified Justice Baker's race as being the "toughest – and the most critical" of all the Republicans running for the Supreme Court. Merrell Dow's lawyer, John Hill, fresh from arguing Merrell's case to this Court, signed Justice Baker's request for money. A copy of the letter (redacted as to recipient) is attached as Exhibit 1. The objective facts in support of this motion are that John Hill stood at the podium before Justice Baker, and the rest of this Honorable Court, and firmly insisted on a reversal of the 13th Court of Appeal's affirmation of Kelly Havner's verdict. Within a week, Mr. Hill signed his name to a letter sent to Texas lawyers seeking to collect money to be used to ensure Justice Baker continues to sit on this Court. John Hill's letter, mailed out on Justice Baker's campaign stationery, causes Justice Baker's impartiality to be reasonably questioned in this proceeding. Consequently, under the clear reading of the rules, Justice Baker "shall disqualify or recuse himself". Tex.R.App.P. 15a and Tex.R.Civ.P.18b(2)(a).

2. Kelly Havner now faces an uncomfortable dilemma, one she should never have had to worry about: basic fairness. She now must ask this Court to spend time evaluating the effects of political conduct as it may relate to her case. She makes this request with much caution and deference. It simply cannot be ignored and there is little question that John Hill's letter puts Justice Baker's impartiality in issue. First, obviously Mr. Hill wants Justice Baker to vote in Merrell's favor in this case as it will save his client approximately Eight Million Dollars

($8,000,000.00). Second, and just as obviously, Justice Baker wants to be re-elected and needs money to assist in his endeavor. John Hill is publicly spear-heading Justice Baker's efforts to build a war chest. Mr. Hill, the former Chief Justice of this Court, is using his name in hopes of peddling influence on behalf of Justice Baker. Justice Baker is relying on Mr. Hill to convince lawyers from around the state to "Send Justice James A. Baker your contribution *today*." This is completely different than when Justice Baker's campaign accepted $5,000.00 on December 27, 1995 from Liddell, Sapp, Zivley, Hill & LaBoon's (Mr. Hill is a named partner in Liddell, Sapp, Zivley, Hill & LaBoon) PAC, or when a single lawyer sends a campaign contribution to his Supreme Court candidate of choice. The focus of this motion is a highly organized fund raising effort which must depend and rely on John Hill's permitting the use of his name to insure large sums of contribution money will go to Justice Baker.

3. Justice Baker may not allow John Hill's leverage to sway him in any way. In fact, Respondent's true hope and belief is that Justice Baker, should he remain on this case, would vote fairly and in a way consistent with his own independent sense of learning and experience. However, this is not the issue. The issue is whether Justice Baker's impartiality is now reasonably in question in this proceeding as a result of his campaign's choice in selecting Merrell's attorney, the lawyer of a pending case, to author a written solicitation for money; money which will go directly to Justice Baker's re-election efforts. Justice Baker is currently considering a case that John Hill argued for Merrell; a case which will save Mr. Hill's

clients millions of dollars should Justice Baker and a majority of this Court follow Mr. Hill's direction. A case that will be tremendously significant in all future litigation involving experts. There can be no serious debate that does not lead to the reasoned conclusion that Justice Baker must recuse himself from voting or participating any further in this matter.

4. Merrell Dow's position as presented by John Hill in this case is that a Judge rather than a jury should decide the weight and credibility of expert testimony. This Court now has an example of the dangers created when elected officials, who have to depend on the financial kindness and political influence of the lawyers who appear in front of them, begin to weigh matters meant to be decided in the jury box. One day, an elected State District Judge, facing the same dilemma as Justice Baker, may have to make a subjective decision regarding an expert. Perhaps the lawyer asking the Judge to rule the expert's testimony inadmissible will have also spearheaded that Judge's fund collecting efforts. Judges and Legislators are necessarily exposed to temptations of money, fame, and power to induce them to disregard justice and sell the rights, and violate the liberties of the people. Jurors, on the other hand, are exposed to none of these temptations. A jury, therefore, ensures the first and indispensable requisite in a judicial tribunal, integrity. A level judicial playing field for both sides is fundamental to the notion of non-partisan fairness. Should Justice Baker remain a sitting member of the Court deciding this case, it does damage to the respected reputation of the man himself, to the Court and to the process of Justice.

5. Respondents, counsel, Robert C. Hilliard, first learned of the mail-out on April 8, 1996. This motion was immediately prepared and mailed to this Honorable Court on April 9, 1996. Respondents make this objection at the first opportunity; therefore, good cause exists under Tex.R.App.P. 15(a) and the Court should permit this objection and motion to be filed.

6. For these reasons, Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner ask that Justice James A. Baker recuse himself from this case. If Justice Baker refuses, Respondents request that the motion be referred to the Court en banc, without Justice Baker, for a ruling.

> *"Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court . . . "*
>
> *John L. Hill, Jr.*
> *Campaign to*
> *Elect Justice James A. Baker*
> *For Texas Supreme Court*
> *March 26, 1996*

Respectfully Submitted,

HILLIARD & MUÑOZ, P.L.L.C.

/s/ Robert C. Hilliard
Robert C. Hilliard
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EXHIBIT 1

James A. Baker
(logo) For Texas Supreme Court

March 26, 1996

Dear

Of all the Republicans running for Supreme Court Justice, James Baker's race for Place 2 will be the toughest – and the most critical.

He's being challenged by Democrat Gene Kelley, who we're concerned will benefit from his well-known name. Texans need only remember when Don Yarborough was elected to the Supreme Court because voters mistook him for former United States Senator Ralph W. Yarborough.

Our concern has heightened since the release of the results of recent State and House Bar Association polls. In the 1996 State Bar Association poll, Baker received 9,377 or 81% of the votes cast – the highest percentage received by any of the four incumbent Supreme Court justices on this year's ballot. Kelley received the remaining 19%.

In the 1996 Houston Bar Poll, Baker was rated "qualified" or "well qualified" by 93% of his total, or 1,115 out of 1,199 votes. By contrast, Kelley received more "not qualified" votes – 877 or 91% of his total – than any other candidate for the Supreme Court.

Justice Baker is clearly and widely thought to be the more qualified candidate by the legal community, but we need your help to ensure Gene Kelley's well-known name doesn't overcome Justice Baker's superior qualifications and abilities.

Will you please donate $500 or $250 to Justice James Baker's campaign today? Your contribution is critical to helping us inform Texans of the clear differences between the two candidates. Justice Baker is the only qualified candidate running for Place 2.

James Baker was appointed by Governor George W. Bush to the state's highest court in October, 1995, to fill the vacancy created by the resignation of Justice Bob Gammage. He has 10 years of experience as a Dallas Court of Appeals justice, and 30 years of experience practicing law.

Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court, and ensuring its decisions are honest and fair.

Gene Kelley, on the other hand, is rated unqualified by the overwhelming majority of the legal community.

We must get our message out to the voters. We must promote James Baker's qualifications, and the significance this election will have on preserving the Court's integrity. Television ads will be a necessity.

Please, help us support the *only* qualified candidate for Supreme Court Justice, Place 2. Send Justice James A. Baker your contribution *today*.

This race is critical. Although there are unequivocal differences between the two candidates, it will most definitely be the most difficult to win. Gene Kelley's high name recognition poses a significant threat to James Baker and to Republicans, unless we can get our message out to the voters.

Thank you for your consideration.

Sincerely,

/s/ Tom Luce
Tom Luce

/s/ John L. Hill, Jr.
John L. Hill, Jr.

P.S. James Baker's race for Place 2 on the Texas Supreme Court will be the most difficult of our Republican candidates. Why? Because his opponent is Gene Kelley, whose well-known name can be enough to get him elected unless we educate the voters. Kelley is rated unqualified by the majority of our state's lawyers – join us in supporting the only candidate for Place 2, Justice James Baker. Please help today.

[Campaign Flyer Omitted In Printing]

May we please have the following information?

The Justice James A. Baker Campaign is required by the new Texas election law to collect the following from you:

_____

Name (please print)

_____

Occupation Job Title

_____

Employer
Is this a law firm? [ ] Yes [ ] No

_____

Home Work

_____

Spouse

_____

Spouse's Occupation Job Title

_____

Spouse's Employer
Is this a law firm? [ ] Yes [ ] No

If contributor is a minor, please check here and complete the information below.

Parent or Guardian's Name(s)

_____

Parent or Guardian's Occupation(s)

_____

Parent or Guardian's Employer(s)

Is this a law firm? [ ] Yes [ ] No

Under the new law affiliation with a law firm includes any partner, associate, shareholder or employee and any person designated "of counsel" to the firm or "of the firm." A contribution by the spouse or child of an individual is considered to be a contribution by the individual. The $30,000 contribution limit placed on all contributions from members of a firm includes contributions by their spouses and children and the law firm's general-purpose political committee.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF NUECES §

On this day, Robert C. Hilliard appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said he read **RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER**, the facts in it are within his personal knowledge, and are true and correct.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me by Robert C. Hilliard on the 9th day of April, 1996.

(SEAL) NANCY WEBSTER
MY COMMISSION EXPIRES
APRIL 1, 1998

/s/ Nancy Webster
Notary Public in and
for the State
of Texas

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was sent to all counsel of record listed below by fax and certified mail on this the 9th day of April, 1996.

/s/ Robert C. Hilliard
Robert C. Hilliard

FAX NO. 713/223-3717
CM/RRR Z 278 687 744

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TEXAS LAWYER NOVEMBER 24, 1997

Lawyers Who Bad-Mouth Judges May Answer to State Bar

by SUSAN BORRESON

Call it free speech of overkill, but lawyers who push the envelope in pleadings could wind up defending themselves against misconduct charges thanks to some fed-up judges who seem more willing than ever before to tattle to the State Bar.

But some grievance lawyers and judges say the referral of lawyers to the State Bar general counsel should remain a rarely used option by judges and courts who get raked over the coals in briefs or motions, and should not replace a court's traditional internal sanctions of imposing a fine or striking a pleading.

"You don't want to confuse contemptuous behavior with unethical behavior," says Michael Schneider, chief justice of Houston's 1st Court of Appeals.

At least seven lawyers this year have gotten into hot water with appeals courts for bad-mouthing or criticizing judges in motions or briefs that the courts deemed disrespectful and possible violations of the Texas Disciplinary Rules of Professional Conduct.

In the most recent case, the state Supreme Court on Nov. 13 threatened Robert Hilliard, of Corpus Christi's Hilliard & Muñoz, and his two co-counsel with monetary sanctions and a grievance investigation after Hilliard authored a motion for rehearing that called the justices "nine nutty professors." The motion also named the court as one of the four horsemen of the apocalypse.

Lawyers' rhetoric in court filings is nothing new to judges. But State Bar General Counsel Steve Young says such referrals, especially for statements made about a judge or court in the context of a case, are few and far between. "There's a sense that judges are willing to deal with things in their courts, through sanctions or otherwise, but unwilling to go that extra step sometimes," says James McCormack, former State Bar general counsel. The recent rash of referrals may signal a slight shift by courts to report alleged misconduct, McCormack says.

Rule 8.03(a) of the disciplinary rules requires lawyers to report another lawyer's possible misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The rule is repeated in canon 3D(2) of the Texas Code of Judicial Conduct.

But some observers question whether the Bar should spend its time investigating behavior that arguably results in nothing worse than hurt feelings. "I guess I'd be hard-put to approve of disciplining a lawyer for what amounts to basically hyperbole," says Charles Silver, a University of Texas School of Law professor who teaches professional responsibility. "This is a tough thing for a court to allow, because they're used to having tremendous deference," Silver says. "[But] it's not necessarily an illegitimate strategy. I'm much more concerned when lawyers misrepresent the facts and the law, which it seems to me they are far freer to do, than I am when they insult judges."

[Picture Omitted In Printing]

Texas Supreme Court Justice Raul Gonzalez says the court's action in Hilliard's case had nothing to do with the judges' sensibilities, but rather respect for the judiciary. "My feelings are bruised every day. You can't be in office and have your feelings not be hurt," Gonzalez says. "If this is all there was, we'd be making a big to-do about nothing."

Indeed, Gonzalez says if he had seen the motion sooner, he would have urged the court to strike it and order Hilliard to refile, delaying the case another few months. The motion was filed when most justices were on vacation or educational leave, he says. The court asked the clerk to flag potentially offensive pleadings and inform the court as soon as possible, Gonzalez says.

One Lawyer's Rhetoric

One lawyer's rhetoric could be another's winning argument, and the recent spate of grievance referrals could chill passionate advocacy, say Hilliard and other lawyers referred to the Bar. "If they decide to make an example out of me, there's probably going to be very little objection to whatever any court does, from now on," Hilliard says.

The recent rash of referrals may signal a heightened willingness of courts to report alleged lawyer misconduct.

Hilliard has fought this battle before. The 13th Court of Appeals in 1994 referred him to the Bar for statements

he made in a motion for en banc rehearing in the same case that has now landed him in trouble with the state Supreme Court. The grievance, Hilliard says, did not result in any sanction.

In that motion, Hilliard said the court had "mutilated" his client, the daughter of a woman who had taken the anti-morning sickness drug Bendectin. The appeals court had thrown out the entire $33.75 million damage award against Merrell Dow Pharmaceuticals, but did reconsider its decision and reinstated the $3.75 million in actual damages.

The state Supreme Court in July threw out the entire damage award in the case, *Merrell Dow Pharmaceuticals Inc. v. Ernest Havner, et al,* No. 95-1036, prompting Hilliard's controversial motion for rehearing. Hilliard authored most of the motion. Appellate lawyer Rebecca Hamilton, of Rockwall's White, White & Hamilton, contributed the law research portion; she says she suggested that Hilliard cut out the controversial remarks, but fully supports Hilliard and the motion. Hilliard's co-counsel at trial, Barry Nace of Washington, D.C.'s Paulson, Nace & Norwind and a former president of the Association of Trial Lawyers of America, could not be reached for comment.

The court ordered the lawyers to respond by Dec. 4 with reasons why the court should not refer them to the Bar, prohibit Nace from practicing in Texas courts, and impose monetary sanctions; it denied Hilliard's request for oral argument on the issue. The court cited Rule 8.02 of the disciplinary rules, which prohibits lawyers from making a statement they know to be false or with reckless

disregard as to its truth or falsity about the qualifications or integrity of a judge.

The burden of proving a lawyer lied, recklessly or knowingly, is a heavy one, says John Gladney, a Houston solo who defends lawyers in grievances. Gladney says a 9th U.S. Circuit Court of Appeals decision in 1995 held that speech against judges is protected unless proven to be false. Young disputes whether that case would be binding in Texas, which he says has no case law directly on this point.

Promoting Respect

Chief justices of the appeals courts that referred lawyers to the general counsel say they take such action only when warranted, and are reinforcing respect for the judiciary. "In a world that seems to have an increasing lack of any sort of dignity or rules – when we're talking about the president's privates, for instance – I think it's important that a certain amount of decorum and respect is in the courts," says Chief Justice Phil Hardberger of San Antonio's 4th Court of Appeals.

Fort Worth's 2nd Court of Appeals in October referred Eldridge Goins, Jeffrey Wigder and James Morris Jr., all of Dallas' Goins, Underkofler, Crawford & Langdon, to the Bar for filing an allegedly frivolous motion to recuse the three-judge panel that heard their client's appeal. "I thought we went to the court with respect and deference, and to exercise our clients' rights, and we came back . . . being severely chastised," says Goins, who declines comment on the grievance because it is ongoing.

The 4th Court of Appeals in May sanctioned San Antonio solo R. Emmett Cater $500 and referred him to the Bar for statements he made in a brief about the trial judge, former Baylor University School of Law Dean Charles Barrow, who ruled against his client in a divorce case property dispute. Barrow's "pathetic determination to 'take from the rich and give to the poor' . . . is a classic example of disregard for the law and the facts, by a man incompetent to comprehend the case at hand," Cater wrote. He later apologized. The grievance is pending, Cater says.

Also earlier this year, the 4th Court referred Marynell Maloney of San Antonio's Law Offices of Maloney & Maloney to the Bar for making statements critical of the court in a motion for rehearing. She could not be reached for comment.

TexLaw *The Supreme Court's rulings in Havner are available on TexLaw. See Page 35 for details.*

www.texlaw.com

APPENDIX N

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

ORDER

1. In accordance with Cannon 3D(2) of the Texas Code of Judicial Conduct, the Court will contact the District 11A Grievance Committee and the Office of General Counsel regarding Robert C. Hilliard for any disciplinary action that may be appropriate.

2. In accordance with Rule XIX(d) of the Rules Governing Admission to the Bar, the Court will contact the District 9 Grievance Committee regarding Barry J. Nace for any disciplinary action that may be appropriate.

3. All motions pending before this Court as of this date are overruled.

Done at the City of Austin, this 11th day of December, 1997.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

By /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

(Dissenting opinion on order of referral by Justice Spector)

(Justice Baker not sitting)

APPENDIX O

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE SPECTOR, dissenting to the order of referral dated December 11, 1997.

I do not dispute that much of the *Havner* motion for rehearing is an intemperate attack on the members of this Court. I would have preferred, of course, that the movant's attorneys had dispensed with the inflammatory rhetoric and concentrated on the critical legal issues involved. Nevertheless, I do not believe that their writing can possibly form the basis for lawyer discipline.

Further, more than fifty years ago Justice Black recognized (in the context of a contempt proceeding for statements published in a newspaper) that attempts to stifle criticism of judges and our courts may, in fact, be counterproductive:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges v. California, 314 U.S. 252, 270-71 (1941). I therefore do not join the other members of this Court in today's order of referral.

Rose Spector
Justice

OPINION DELIVERED: December 11, 1997

APPENDIX P

No. 13-92-00540-CV

IN THE
SUPREME COURT
OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

vs.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents.

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

MOTION BY AND OF BARRY J. NACE FOR RECONSIDERATION AND TO RESCIND THE ORDER REFERRING HIM TO THE GRIEVANCE COMMITTEE

Comes now your petitioner and moves this Court to reconsider and rescind the Order referring him to the grievance committee for the following reasons.

1. He did not write, see, approve, incite, sign or in any way have anything to do with the pleading (Motion for Rehearing) filed in this case that was the subject of the Show Cause Order AS ALL OF THE EVIDENCE AND ALL OF THE STATEMENTS OF ALL ATTORNEYS IN THE CASE CONFIRM.

2. Co-counsel in this case have confirmed the foregoing and stated that your Petitioner did not write a single word of said pleading. (See Motion for Clarification, p. 3, 4; Nace Affidavit; Hamilton Affidavit). Your Petitioner "did nothing in regards to the motion." (See Hilliard affidavit, attached). "Nothing."

3. Three counsel were noted by the Court in its show cause order. One wrote "much"; a second wrote "some"; and the third, your petitioner, wrote "none", i.e. he had absolutely nothing to do with, nor wrote any of the Motion for Rehearing.

4. The counsel who wrote "some", Ms. Hamilton, is a woman, a Republican, and a citizen of Texas. (See Brief, p. 3).

5. The counsel who wrote "none", your petitioner is a man, a Democrat and not a citizen of Texas.

6. A. Ms. Hamilton stated that she contributed to only three pages in the Motion for Rehearing that were the subject of the Court's Show Cause Order. Your Petitioner wrote none of any of the pages referred to by the Court, did not contribute to those pages, and did not contribute to any part of the brief.

B. Ms. Hamilton wrote the legal analysis portion of the Motion and not the Argument Portion. Your Petitioner wrote neither.

C. Ms. Hamilton did not sign the Motion, neither did your Petitioner.

D. Ms. Hamilton was not lead counsel and had no authority to make decisions on the use of rhetoric;

your Petitioner never even had such an opportunity – nor authority; and

E. Ms. Hamilton acted in good faith. So did your Petitioner who did not even recommend filing *any* motion. (See Hamilton Response, p. 2).

7. Ms. Hamilton has "supported every current member of this Court". Your Petitioner has never supported any member of this Court. But, he did not support any of their opposition.

8. Ms. Hamilton was not referred to the grievance committee. Your Petitioner was.

9. Your petitioner is left with the question of how, since it is undisputed that he *was not* involved with the Motion for Rehearing, he was referred to the grievance committee. Ms. Hamilton, however, *was* involved with the Motion for Rehearing and she was not referred. Is the only proper conclusion of why there is a difference in treatment being that she is a woman and your petitioner is not; or that she is a Republican who supported every current member of this Court and he is a Democrat; or that she is a citizen of Texas and he is not; or a combination of all three. In any event such would be considered a discriminatory act.

10. Your petitioner concludes that since he had nothing to do with the Motion for Rehearing in any way – which is uncontested in this record – that there must be some other reason why this court is harassing him.

11. Your petitioner has been counsel in Texas only in this case. He treated the trial court with respect at all times, he treated the intermediate Court of Appeals with

respect at all time; and the video-taped argument before this Court will show he was eminently respectful. He has never filed any pleadings in this case that were not respectful. Why then has this court taken the action it has?

12. Your petitioner has served the Bar over his 25 years of practice. A review of his curriculum vitae attached shows numerous volunteer services on behalf of the Bar including his current participation as an appointed member (by the District of Columbia Court of Appeals) of the Unauthorized Practice of Law Committee of the D.C. Bar; membership in the American Law Institute; Trustee of the Roscoe Pound Association; and many other volunteer bar association activities.

13. Your petitioner has served, as a volunteer, as President of the Association of Trial Attorneys of America.

14. Your Petitioner is a member of four state bars; a member of the Bar of the United States Supreme Court; and a member of numerous Circuit Bars.

15. Your Petitioner has already been hurt by this Court's conduct. A reporter began a telephone conversation the night of the Order (December 11, 1997) by saying, "I understand you're the lawyer who wrote the brief that said . . . ".

16. Since your Petitioner clearly had nothing to do with the pleading that was the subject of the show cause order, he can only conclude that there is some other reason why the Court has taken the action it has, unless it has just made a mistake.

17. Perhaps the Court wanted your Petitioner to apologize for that which he has not done and beg for forgiveness. Your Petitioner will not, as he did nothing – he made no mistake.

18. The action of this Court under the circumstances has greatly damaged your Petitioner and his reputation, which has been earned over 25 years, and will continue to damage and injure him. This Court has inflicted great emotional distress upon your petitioner.

19. This Court issued a Show Cause order and if failure to have performed any offending act in any way and in any capacity is not a sufficient showing, then what is? How much more innocent could one be?

20. If this Court does not reconsider and rescind the referral, your Petitioner is going to continue to be harmed by the erroneous act and will have to take steps – expensive ones – to prove his innocence and restore his good name and to learn why this action has been taken.

21. If a lawyer has to put up with this kind of abuse of power in the absence of ANY evidence warranting a referral to the grievance committee and the obvious discrimination that exists here, it is a "sad day" and the legal profession is doomed and your Petitioner wants no part of such a system.

22. Indeed your Petitioner takes this so seriously that he is prepared to give up his law practice to devote full time to trying to recover his good name, take whatever legal action necessary, and fight this clear abuse of power.

23. At this point in time there hasn't been one iota of evidence (or even an opinion) asserting what it is your Petitioner did or did not do. Clearly there is a lack of due process and a clear violation of every rule of this Court.

24. What this Court has done is not just; it is unfair; and it is just plain wrong. It is hoped that this court would end the matter right now by rescinding its Order referring the undersigned to the Grievance Committee.

Respectfully submitted,

/s/ Barry J. Nace
Barry J. Nace

District of Columbia: SS

Subscribed and sworn to before me this 15th day of December, 1997.

/s/ Melissa A. Van Vugt
Melissa A. Van Vugt
Notary Public, District of Columbia
My Commission Expires: October 14, 2002

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Motion By and Of Barry J. Nace For Reconsideration and To Rescind the Order Referring Him To The Grievance Committee on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for

Rehearing. I served this Motion by United States mail on this 15th day of December, 1997.

/s/ Barry J. Nace
Barry J. Nace

Robert C. Hilliard, Esq.
Hilliard & Munoz, P.C.
719 South Shoreline Boulevard
Suite 600
Corpus Christi, TX 78401

Gerald L. Spence, Esq.
Spence, Moriarity & Schuster
P.O. Box 548
Jackson, Wyoming 83001

William J. Dorsaneo, III, Esq.
SMU School of Law
P.O. Box 750116
Dallas, TX 75275

Rebecca Hamilton, Esq.
Todd W. White, Esq.
White, White & Hamilton, P.C.
118 East Rusk Street
Rockwall, TX 75087

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

VS.

ERNEST and MARILYN HAVNER, on Behalf Their Minor Child, KELLY HAVNER,

Respondents,

On Motion for Rehearing

AFFIDAVIT OF ROBERT C. HILLIARD

COUNTY OF NUECES)
)
STATE OF TEXAS)

On this the 12th day of December, 1997, Robert C. Hilliard appeared personally before me, the undersigned authority, and, upon being duly sworn by me, Mr. Hilliard attested, deposed, and swore as follows:

"1. The motion made the basis of this Court's recent referral has a simple history. Easy to follow and understand. I wrote the motion save for parts of the legal writing which were penned by Rebecca Hamilton. Prior to filing Ms. Hamilton reviewed, considered, and supported the entire motion. She took a stand for justice of which she was proud. Mr. Nace, who tried the case with me and who argued the case with me in front of this

Court, did nothing in regards to the motion. Nothing. Yet, this court cuts Ms. Hamilton loose and sends Mr. Nace to the grievance committee. If this court is referring lawyers who knew nothing of the motion's contents (apparently the typed name on the motion does not cause this Court to be grieved as Ms. Hamilton's name was typed on the motion, as well as Mr. Nace's) to the grievance committee, then please consider the entire list of licensed lawyers in Texas."

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public on this the 12th day of December, 1997, to certify which witness by hand and seal.

(SEAL) SUSAN F. TAYLOR
Notary Public
STATE OF TEXAS
My Comm. Exp.
June 8, 2000

/s/ Susan Taylor
Notary Public, Nueces County, Texas

CURRICULUM VITAE
BARRY J. NACE

HOME	:	6208 Garnett Drive Chevy Chase, Maryland 20815 (301) 657-9393
OFFICE	:	Paulson, Nace & Norwind 1814 N Street, N.W. Washington, D.C. 20036 (202) 463-1999
PERSONAL	:	Born: York, Pennsylvania November 28, 1944 Married: Andrea G. Nace Children: 3 boys: Christopher, Jonathan, Matthew
EDUCATION	:	Dickinson College, B.S. in Chemistry, 1965 Dickinson School of Law, 1969, J.D. Dickinson School of Law, 1994, L.L.D.
MAJOR AREAS OF PRACTICE	:	Medical Malpractice, Drug Product Liability, Trial and Appellate Practice
BOARD CERTIFICATION	:	National Board of Trial Advocacy, Civil Pracitce [sic]

BAR MEMBERSHIPS	:	United States Supreme Court, 1973 Maryland, 1970 District of Columbia, 1971 Pennsylvania, 1972 West Virginia, 1997 U.S. District Court for the District of Columbia U.S. District Court for the District of Maryland U.S. District Court for the Eastern District of Pennsylvania U.S. Courts of Appeal for the Fourth, Sixth and District of Columbia Circuits U.S. Patent Office, Reg. No. 25776
COURT APPOINTMENTS	:	D.C. Court of Appeals: Unauthorized Practice of Law Committee, 1994 – 2000
BAR ASSOCIATIONS & FOUNDATIONS	:	ASSOCIATION OF TRIAL LAWYERS OF AMERICA President, August 1993 – July 1994 President-Elect, July 1992 – August 1993 Vice-President, July 1991 – July 1992 Treasurer, 1989-1991 Board of Governors, 1978-1987

Home Office and Budget Committee
1984-1988, 1989-1991
Chairman, Public Relations Dept. 1980-1982
Vice Chairman, Professional Research and Development, 1983
Chairman, Administration Dept. 1985-1986
State Delegates, 1988-1989; Vice-Chair, 1988-1989
ATLA Exchange Advisory Committee, 1987-1990
ParaLegal Advisory Committee, Chairman 1989-1990

INTERNATIONAL ACADEMY OF TRIAL LAWYERS
D.C. TRIAL LAWYERS ASSOCIATION President, 1977-1978
President, 1986-1987
MARYLAND TRIAL LAWYERS ASSOCIATION
WEST VIRGINIA TRIAL LAWYERS ASSOCIATION
PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
ASSOCIATION OF PERSONAL INJURY LAWYERS IN GREAT BRITAIN
TRIAL LAWYERS FOR PUBLIC JUSTICE
Founding Member
Board Member, 1987-1988

D.C. BAR ASSOCIATION
Negligence Division, Steering Committee 6 years

BAR ASSOCIATION OF D.C.

Chairman, Medical-Legal Committee, 1980

MONTGOMERY COUNTY BAR ASSOCIATION

ROSCOE POUND FOUNDATION
Board of Trustees, 1993-1995
Permanent Honorary Trustee, 1995
Participant, 1989 Warren Conference, Roscoe Pound Foundation of "Medical Quality and the Law"

AMERICAN BOARD OF TRIAL ADVOCATES, Associate

AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS, Diplomate [sic]

LAMBERT SOCIETY, Trustee

CIVIL JUSTICE FOUNDATION

POLITICAL ACTIVITIES	:	ATLA PAC Chair, 1995 – 1997 (Trustee 1992 – 1997) DC LEGAL (Trustee 1977 – 1994)
ELECTED MEMBERSHIPS	:	Counsellors Who's Who in American Law Scribes Best Lawyers in America
PUBLICATIONS	:	"A Checklist for Maximizing Damages," *Trial*, June, 1981 "Epidemiological Evidence," *Trial*, October, 1988 Book Reviewer for Lawyer's Medical Journal and Medical Trial Technique Quarterly Contributing Author, *Trauma* "Standard of Proof in Drug and Toxic Tort Product Liability Cases – 'Preponderance' or 'Scientific Certainty' ", *Products Liability Law Journal*, 1988 "Presenting the Medical Evidence: Paraplegia and Sequelae from a Ruptured Aorta", *Trauma*, April, June, 1988

"Expert Evidence, Groping For Consensus in Science and Law," *Trial*, September 1992

"The Call to Lead", *Trial*, August 1993

"Assault on the Jury: The Story of a Pharmaceutical Case", *Trial*, September 1993

"Daubert: Victory for the Jury", *Trial*, October 1993

"Juror Bashing: Attack on the People", *Trial*, November 1993

"The ADR Debate: Efficiency Before Justice?", *Trial*, December 1993

"Exposed: The Campaign to Destroy Justice", *Trial*, January 1994

"Health Care Consumers: The Unnecessary Bargaining Chips", *Trial*, February 1994

"Update from Capitol Hill", *Trial*, March 1994

"The 'Legal Scholars' Speak on Contingency Fees", *Trial*, April 1994

"Fighting for Justice", *Trial*, May 1994

"Committees Make Strides in Civil Justice Battle", *Trial*, June 1994

"Keeping the Public Conscience", *Trial*, July 1994

"The Contingent Fee," *Trial*, October 1994
"Who'd have thought?" *Trial*, December 1996
"Products Liability: Tips and Tactics" *Trial*, November 1997

EDUCATIONAL ACTIVITIES : American Law Institute
American Inns of Court (Master)
National College of Trial Advocacy, Lecturer and Workshop Leader
NITA Patent Trial Practice Program Leader
Guest lecturer at Dickinson School of Law, George Washington University, and American University of Law Schools in Medical Malpractice and Product Liability Law, and to the D.C. Medical Society
Guest lecturer for Association of Trial Lawyers of America at numerous seminars and for the Arizona, Arkansas, California, Colorado, Connecticut, Metropolitan District of Columbia, Florida Academy, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey,

New Mexico, New York State, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Philadelphia, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington State, West Virginia, Wyoming Trial Lawyer Associations and other Bar Associations
Phi Kappa Phi Annual Convention
Expert Witness Seminar, San Francisco, April, 1993
Australian Trial Lawyers, September, 1993
American College of Legal Medicine, March 1994
ALI-ABA Program on Product Liability, August, 1994
Numerous radio and TV programs including: The Pat Buchanan Show; Kamber-O'Leary Report; It's Your Business; Techno-Politics; Fox Morning Show; and others

LEGISLATIVE ACTIVITIES : Testified before Maryland House of Delegates and D.C. City Council on Malpractice Legislation on numerous occasions

SYMPOSIUM	:	Brookings Institute, Charting a Future for the Civil Jury System, Invited Participant
NOTABLE APPELLATE DECISIONS	:	*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) *Ambrosini v. Labarraque, M.D., et al.*, 966 F.2d 1464 (D.C. Cir. 1992) *DePyper v. Paul F. Navaro, D.O.*, No. 11630 (Mich. Ct. App. May 9, 1991) *Oxendine v. Richardson-Merrell, Inc.*, 506 A.2d 1100 (D.C. 1986); 563 A.2d 330 (D.C. 1989) *In Re Bendectin*, 749 F.2d 300 (1985) *Lamade v. Wilson*, 512 F.2d 1348 (D.C. App. 1975) *Jacron v. Sindorff*, 27 Md. App. 53, 341 A.2d 856 (Md. Ct. App., 1975) *Adkins v. Morton*, 494 A.2d 652 (D.C. App. 1985 *Nimetz v. Cappadona*, 596 A.2d 603 (D.C. App. 1991)
AWARDS	:	Attorney of the Year, 1976, Metropolitan Washington, D.C. Trial Lawyers Association Nominated and Finalist for Attorney of the Year

by Trial Lawyers for Public Justice, 1984, 1986, 1988, and 1995

Special Recognition Award, D.C. Trial Lawyers Association, 1988

Outstanding Achievement Award, 1994, Trial Lawyers Association of Metropolitan Washington, D.C.

HOBBIES : Coaching baseball for youths
Golf
Racquetball
Reading

APPENDIX Q

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

**AFFIDAVIT OF REBECCA E. HAMILTON
IN SUPPORT OF MOTION BY
AND OF BARRY J. NACE
FOR RECONSIDERATION AND TO RESCIND THE
ORDER REFERRING HIM TO
THE GRIEVANCE COMMITTEE**

STATE OF TEXAS §
§
COUNTY OF ROCKWALL §

On this, the 17th day of December, 1997, Rebecca E. Hamilton appeared personally before me, the undersigned authority, and, upon being cautioned and sworn

by me, Ms. Hamilton attested, deposed and swore as follows:

1. "I am Rebecca E. Hamilton. I am over the age of 18, have never been accused, charged, or convicted of any crime of moral turpitude or felony. I have no mental disabilities. I am fully competent to execute this Affidavit and have personal knowledge of the facts I aver herein.

2. I have reviewed the Motion by and of Barry J. Nace for Reconsideration and to Rescind the Order Referring Him to the Grievance Committee ("Motion to Rescind").

3. I was present during the physical drafting and finalization of the Motion for Rehearing at issue. As he states in ¶ 1 of his Motion to Rescind, Mr. Nace did not write, approve, incite, or sign the Motion for Rehearing. Not one word.

4. Indeed, Mr. Nace counselled against filing *any* pleading seeking rehearing as it was his belief that such could not prevail."

FURTHER, AFFIANT SAYETH NAUGHT.

/S/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public, on this, the 17th day of December, 1997, to certify which witness my hand and seal.

/s/ Nancy Semple
Notary Public in and for
the State of Texas

[SEAL] NANCY SEMPLE
MY COMMISSION EXPIRES
June 30, 2001

APPENDIX R

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' SECOND MOTION FOR REHEARING

Robert C. Hilliard
State Bar No. 09677700
HILLIARD & MUÑOZ, P.C.
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Corpus Christi, Texas 78401

Barry J. Nace
PAULSON, NACE
& NORWIND
1814 N. Street, N.W.
Washington D.C. 20036

Todd W. White
State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 08837050
WHITE, WHITE
& HAMILTON, P.C.
118 East Rusk Street
Rockwall, Texas 75087

COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' SECOND MOTION FOR REHEARING

COME NOW Respondents, Ernest and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner ("Kelly Havner"), and serve and file Respondents' Second Motion for Rehearing, and, in support thereof, respectfully show unto the Court the following:

ARGUMENT

A. Texas Law, as Well Federal Principles of Due Process, Require a Remand – And Not a Reversal – When This Court Changes the Common Law After a Jury Has Declared Its Verdict.

The Court's opinion in this appeal has changed the law of Texas as to the standard of review applicable in

cases involving scientific evidence – perhaps even all evidence proffered by experts. The Court has held for the first time in this history of Texas jurisprudence that:

(1) A trial court must independently evaluate an expert's underlying data in determining whether the expert's opinion is reliable and, therefore (presumably) legally sufficient (Opinion at 12);

(2) The factors the Court previously has held as relevant to admissibility of expert evidence, *vis.*, the *Robinson* factors, are relevant to a no evidence review of scientific evidence (Opinion at 15);

(3) Prior to "properly designed and executed epidemiological studies" being deemed legally sufficient, the offering party must demonstrate a "doubling" of the risk at issue (Opinion at 23);

(4) In addition to a showing of a doubling, "Other factors must be considred," such as the "design and execution of epidemiological stud[ies]," and what the "relative risk factor" is (while the Court does not conclude that a relative risk factor of 3 is required, it impliedly rejects a risk factor of 2) (Opinion at 25-27); and

(5) The offering party's expert must predicate his conclusions on a confidence level of not less than 95% (Opinion at 37).

Indeed, the Court appears to merge the issue of reliability (and, therefore, admissibility) and evidentiary sufficiency:

> In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming that it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors, affecting the reliability of particular studies, whether there is legally sufficient evidence to support the judgment.

(Opinion at 30.)

Since the Court issued its opinion in this matter, the United States Supreme Court has issued a decision in *General Electric Co. v. Joiner*, Cause No. 96-188, 1997 U.S. LEXIS 7503 (Dec. 15, 1997) (Respondents attach a copy of *Joiner* hereto, for the Court's convenience). In *Joiner*, the Supreme Court addressed the issue of "what standard of review an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). *Id.* at *5-6. The Court held that the correct standard is "abuse of discretion." *Id.* at *6.

Though holding for the defendant in that "toxic tort" case[1], the Court observed, "Trained experts commonly extrapolate from existing data. But nothing in either

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[1] Justice Stevens, in his concurrence and dissent, observed, "In any event, it bears emphasis that the Court has not held that it would have been an abuse of discretion to admit the expert testimony. The very point of today's holding is that the abuse of discretion standard of review applies whether the district judge has excluded or admitted evidence." *Id.* at 33.

Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." *Id.* at *19. Here, the trial court judge chose to conclude that the experts' extrapolations from existing data were based on more than the "ipse dixit" of an expert. This decision in federal court, and under the preexisting Texas law, was due an "abuse of discretion" standard of review.

As Justice Breyer noted in his concurrence (Stevens, J., joining in part), "Yet, as amici have pointed out, judges are not scientists and do not have the scientific training that can facilitate the making of such decisions." *Id.* at *21. " 'A judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make a greater use of their inherent authority . . . to appoint experts. . . . Reputable experts could be recommended to the courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.' " *Id.* at *24-25 (ellipses in original) (quoting from the Amicus Brief of The New England Journal of Medicine, 18-19).

Yet this Court's new decision effectively precludes such an option because it requires the trial court both to decide admissibility, based on "reliability," and then independently critique "reliability" in a separate, evidentiary sufficiency review, based on a scientist's techniques and conclusions, as well as his very data! This Court's detailed reanalysis of the evidence at trial makes clear that scientists' – experts' – appraisals and opinions regarding data are not dispositive; rather, judges (and not juries) determine the weight of the evidence.

It is within the province of this Court to create such law. And, having done so, it is up to litigants such as Kelly Havner to strive to satisfy this new requirement. And, yet can it seriously be disputed that this is entirely new law for Texas, both in terms of procedure (a trial court's initial reanalysis of data supporting expert conclusions) and substance (a trial court's determination of the credibility of an expert's conclusions). Indeed, in light of *Joiner*, this is new law in the United States.

Respondents thus respectfully contend that federal principles of due process, as well as the Texas Rules of Appellate Procedure, demand that the Court remand Kelly Havner's case for a new trial. The Texas Rules of Appellate Procedure provide:

> In each cause, the Supreme Court shall either affirm the judgment of the court of appeals, or reverse and render such judgment as the court of appeals should have rendered, or remand the cause to the court of appeals, or reverse the judgment and remand the cause to the trial court, *if it shall appear that the justice of the cause demands another trial.*

Tex. R. App. P. 180 (emphasis added). This Court frequently invokes Rule 180 as a basis for granting a litigant a new trial when it changes the law under which a party has tried her case. For example, in *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1991), this Court modified its prior holding in *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165, 168 (Tex. 1987). *Id.* at 830. Writing for the Court, Justice Gonzalez stated:

> It is reasonable to assume that Murray, relying on *Arnold*, concluded that her cause of action

> accrued on the date SJA admitted its denial unwarranted. . . . Our decision today, however, modifies *Arnold* so that limitations on Murray's good faith claim commenced on the day SJA denied coverage. . . . Since we have modified the law, we will remand this case in the interest of justice to the trial court.

Id. at 830; *see also Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 433 (Tex. 1984) (op. on reh'g) (remanding when "the new theory or rule required new and different evidence"), and *L.M.B. Corp. v. Gurecky*, 501 S.W.2d 300, 303 (Tex. 1973) ("these changes in the trial practice justify this court's remand of this cause . . . in the interest of justice").

Indeed, Chief Justice Phillips recently has observed that, "Where it appears from the record that the losing party may be able to recover under some alternative factual or legal theory not pursued at the first trial, we have frequently remanded in the interest of justice." *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607, 616 (Tex. 1996) (Phillips, C.J., dissenting); *see also Casso v. Brand*, 776 S.W.2d 551, 565-66 (Tex. 1989) (Chief Justice Phillips providing majority opinion but then dissenting on Court's failure to remand under Tex. R. App. P. 180).[2]

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[2] *See also: Continental S. Lines, Inc. v. Hilland*, 528 S.W.2d 828, 830-31 (Tex. 1975) (remand to allow plaintiff to pursue alternative legal theory); *Continental Casualty Co. v. Cook*, 515 S.W.2d 261, 263 (Tex. 1974) (*per curiam*) (same); *Members Mut. Ins. Co. v. Tapp*, 469 S.W.2d 792, 793 (Tex. 1971) (same); *Houston Fire & Casualty Co. v. Nichols*, 435 S.W.2d 140, 143 (Tex. 1968) (remand to allow plaintiff to offer different evidence); *C&R*

While it is a legal truism that due process does not protect a right to appeal in and of itself, once the state accords to litigants an appellate system governed by the common law and rules of practice, then due process requires that all litigants be treated in keeping with its protections. When this case began, Kelly Havner was a child with a misshapen hand – a birth defect she will carry as a reminder of this case her whole life, regardless of whether Bendectin or some genetic quirk of fate caused it. Now Kelly is a young woman, with the same hand but bereft of the verdict that a jury granted her under the system of law in effect at the time of trial. She patiently has awaited justice, and has followed this case avidly and eagerly, not merely as a participant but as an admirer of the American system of jurisprudence. For the Court now to deny her the new trial to which Texas law – as well as the rules of practice issued by this Court – accord her is to scar her soul as palpably as her hand is scarred physically.

WHEREFORE, PREMISES CONSIDERED, Respondents, Ernest and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner, move the Court to grant this Second Motion for Rehearing motion and grant Respondents' a new trial, and for such other and further relief, in

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Trans., Inc. v. Campbell, 406 S.W.2d 191, 195-96 (Tex. 1966) (remand because jury may have misunderstood charge); *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (holding that remand is proper "when this Court changes the rules after the case has been tried"); *Aetna Ins. Co. v. Klein*, 325 S.W.2d 376 (Tex. 1959) (remand to allow plaintiff to put on different evidence); and *City of San Antonio v. Pigeonhole Parking*, 311 S.W.2d 218, 223 (Tex. 1958) (same).

equity or at law, general or special, to which they show themselves justly entitled.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

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ATTORNEYS FOR
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CERTIFICATE OF SERVICE

Pursuant to Rule 190, Texas Rules of Appellate Procedure, I certify that I served a true and correct copy of this document by regular mail, on all counsel of record, as identified below, on this the 24th day of December, 1997.

/s/ Rebecca E. Hamilton
Rebecca E. Hamilton

VIA UNITED STATES MAIL

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APPENDIX S

(Seal) **THE SUPREME COURT OF TEXAS**
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RE: Case Number 95-1036
Case No. 13-92-00540-CV, in the Court of Appeals for the Thirteenth District
Case No. 88-3915-F, in the 214th Judicial District Court of Nueces County, Texas
Style: MERRELL DOW PHARMACEUTICALS, INC.
v.
ERNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER

Dear Counsel:

Today, the Supreme Court of Texas overruled respondents' motion for leave to file second motion for rehearing with the following notation: "*See* TEX. R. APP. P. 64.4." (Justice Spector notes her dissent.)

Also overruled is the motion of Barry J. Nace for reconsideration and to rescind the order referring him to the grievance committed. (Justice Spector notes her dissent.)

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

cc: Ms. Cathy Wilborn, Clerk
Mr. Oscar Soliz
Chief Justice Robert J. Seerden
Hon. Michael J. Westergren

APPENDIX T

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

Respondents.

On Motion for Rehearing

RESPONDENTS, ERNEST and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER'S, MOTION TO SEVER

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COUNSEL FOR RESPONDENTS

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

Respondents.

On Motion for Rehearing

RESPONDENTS, ERNEST and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER'S, MOTION TO SEVER

COME NOW Respondents, Ernest Havner and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner ("Respondents"), and, pursuant to Texas Rule of Appellate Procedure 60.6, serve and file Respondents' Motion to Sever, and, in support thereof, respectfully show unto the Court the following:

MOTION

On December 11, 1997, this Court entered an order in the above-styled and numbered cause, which order referred attorneys Robert C. Hilliard and Barry J. Nace to

the Grievance Committee of the State Bar of Texas in connection with the Motion for Rehearing Respondents filed in this matter. The December 11th Order did not refer to the merits of Respondents' case.

On January 16, 1998, this Court overruled the motion of counsel, Barry J. Nace, for reconsideration of and to rescind its December 11th Order, which referred Mr. Nace to the Grievance Committee. At the same time, the Court also overruled Respondents' motion for leave to file a second motion for rehearing, which motion addressed the merits of this case.

Messrs. Hilliard and Nace intend to appeal the Court's December 11th Order referring them to the Grievance Committee. Messrs. Hilliard and Nace have a serious and well-recognized interest in protecting their professional reputations. *Walker v. City of Mesquite,* 129 F.3d 831 (5th Cir. 1997) (stating that the Court is "persuaded beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset"). Messrs. Nace and Hilliard further intend to appeal, on behalf of Respondents, the Court's decision on the merits.

According, and pursuant to Texas Rule of Appellate Procedure 60.6, Respondents move the Court to sever the Court's decision as to Messrs. Hilliard's and Nace's conduct and assign it to the Court's administrative docket, according it a new docket number in the process. Respondents do not seek to delay or hinder these proceedings but, rather, to avoid any further interference between the referral matter and the merits, in order that justice may be done. *See* and *compare In re Maloney,* 949 S.W.2d 385 (Tex. App. – San Antonio 1997, n.w.h.) (per curiam)

(Docket No. 04-97-00334-CV), *with Crestway Care Center, Inc. v. Hon. Berchelmann*, 945 S.W.2d 872 (Tex. App. – San Antonio 1997, mand. dism'd as improv. granted) (*en banc* op. on reh'g) (Docket No. 04-97-00070-CV).

WHEREFORE, PREMISES CONSIDERED, Respondents, Ernest and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner, move the Court to grant this Respondents' Motion to Sever and assign the grievance-related matters to the Court's administrative docket, with a new docket number, and for such other and further relief, in equity or at law, general or special, to which they show themselves justly entitled.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

Pursuant to Rule 190, Texas Rules of Appellate Procedure, I certify that I served a true and correct copy of this document by regular mail, on all counsel of record, as identified below, on this the 2nd day of February, 1998.

/s/ Rebecca E. Hamilton

VIA UNITED STATES MAIL

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APPENDIX U

(Seal) **THE SUPREME COURT OF TEXAS**
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RE: Case Number 95-1036
Case No. 13-92-00540-CV, in the Court of Appeals for the Thirteenth District
Case No. 88-3911-F, in the 214th Judicial District Court of Nueces County, Texas

Style: MERRELL DOW PHARMACEUTICALS, INC.
v.
ERNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER

Dear Counsel:

Today, the Supreme Court of Texas overruled respondents' motion to sever in the above-referenced cause.

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

cc: The Hon. Darrell B. Hester
Ms. Cathy Wilborn, Clerk
Mr. Oscar Soliz

APPENDIX V

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257(3)(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.